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The Emerging Jurisprudence of the African Human Rights Court and the Protection of Human Rights in Africa

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ABSTRACT

During most of the post-independence period, many African countries have either been unwilling or unable to protect human rights or relegated this important function to a small group of poorly funded but brave and courageous non-state actors. Most importantly, some African governments have either actively engaged in human rights violations or failed to bring to justice those who have committed atrocities against their fellow citizens. In the 1970s and 1980s, many African heads of state were more concerned with national sovereignty in an effort to hide the violation of human rights committed within their jurisdictions than participating in the building, within the continent, of supranational institutions for the protection of human rights. Despite this opposition, the Organisation of African Unity (OAU) was still able to adopt the African Charter on Human and Peoples' Rights (Banjul Charter) in 1981, paving the way for the eventual adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) in 1998—the latter established the African Court on Human and Peoples' Rights (African Human Rights Court), as the judicial arm of the African Union. Since the Court officially commenced its operations in November 2006, it has developed a relatively progressive human rights jurisprudence, which provides the continent with a solid foundation for the adjudication of cases involving the violation of human rights. However, its sustainability is being threatened by financial instability, the unwillingness of African Union (AU) member states to accept the Court's rulings, and the decisions by some countries to take actions that deny their citizens and nongovernmental

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organizations (NGOs) within their jurisdictions the right to directly bring cases to the Court. The way forward calls for the AU to greatly strengthen both the Court's financial and institutional architecture and its independence and ensure that its rulings are accepted and respected by all member states.

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I. INTRODUCTION

In an article published in 2021, Mausi Segun, the executive director of Human Rights Watch's Africa Division, argued that human rights abuses had escalated in Africa during the COVID-19 pandemic.[1] She noted that 2020 had introduced the world to a "new normal" characterized by "waves of almost worldwide protests on racial injustice and police brutality that resonated loudly in Africa."[2] As the virus spread from China to various parts of Africa, noted Segun, "incidents of Covid-linked discrimination and hate crimes, frequently targeting Asians in African countries, as well as discriminatory and xenophobic treatment of Africans in China," became pervasive.[3]

In addition, misinformation by both state and non-state actors in several African countries (e.g., Burundi and Tanzania) spread primarily through various internet platforms and undermined efforts to fight what was a fast-spreading virus. Most importantly, politically motivated internet showdowns by opportunistic and dysfunctional governments "violated the right to life-saving information about the global health crisis" and negatively impacted the health of many people, especially the poor.[4] Research shows that "[m]isinformation and miscommunication disproportionally affect individuals with less access to information channels, who are thus more likely to ignore government health warnings."[5] In addition, research by Amnesty International (AI) determined that a "[p]andemic hits those shackled by oppression hardest thanks to decades of inequalities, neglect and abuse."[6]

When the COVID-19 pandemic hit the African continent, many governments responded by introducing "severe restrictions on movement and the freedom of assembly," including, in some cases, "full

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1. Mausi Segun, *Human Rights Abuses Escalate in Africa During the Pandemic*, HUM. RTS. WATCH (Jan. 18, 2021), https://www.hrw.org/news/2021/01/18/human-rights-abuses-escalate-africa-during-pandemic [https://perma.cc/4YTT-N3KV] (archived Dec. 19, 2022).

2. *Id.*

3. *Id.*

4. *Id.*; *see also* ELEANOR MARCHANT & NICOLE STREMLAU, PROGRAM IN COMPAR. MEDIA L. & POL'Y, UNIV. OF OXFORD, AFRICA'S INTERNET SHUTDOWNS: A REPORT ON THE JOHANNESBURG WORKSHOP 9–13 (2019), https://pcmlp.socleg.ox.ac.uk/wp-content/uploads/2019/10/Internet-Shutdown-Workshop-Report-171019.pdf (last visited Jan. 8, 2023) [https://perma.cc/9EWV-FQJE] (archived Jan. 8, 2023) (examining internet shutdowns in Burundi, Cameroon, Ethiopia, Kenya, Morocco, South Sudan, Uganda, and Zimbabwe).

5. Faheem Ahmed, Na'eem Ahmed, Christopher Pissarides & Joseph Stiglitz, *Why Inequality Could Spread COVID-19*, 5 LANCET PUB. HEALTH e240 (2020).

6. *Sub-Saharan Africa: The Devastating Impact of Conflicts Compounded by COVID-19*, AMNESTY INT'L (Apr. 7, 2021), https://www.amnesty.org/en/latest/news/2021/04/subsaharan-africa-the-devastating-impact-of-conflicts-compounded/ [https://perma.cc/9NTQ-J4AG] (archived Dec. 19, 2022) [hereinafter *Sub-Saharan Africa*, AMNESTY INT'L].

lockdowns."[7] The enforcement of these COVID-19-related restrictions "triggered arbitrary arrests, beatings, torture and extrajudicial killings by government forces in Kenya, Nigeria, Rwanda and [South Africa]."[8] Many governments throughout the continent were using laws designed to manage the pandemic and minimize its spread to violate the human rights and fundamental freedoms of their citizens. As determined by AI, African politicians weaponized COVID-19 to significantly increase assaults on human rights.[9]

Throughout Africa, "[d]omestic and gender-based violence increased" significantly during COVID-19-related curfews and lockdowns, with South Africa's "President Cyril Ramaphosa describing it as a scourge and a declaration of war against women."[10] In addition, many countries "forced schools to shut down, leaving millions of children without education and disproportionately harming girls."[11] COVID-19-related human rights violations had a disproportionate impact on historically vulnerable groups such as "migrants, minorities and low-income workers."[12] In addition, in 2020, many countries in Africa held general elections, many of which were pervaded and tarnished by violence,[13] as governments responded to citizens' protests and any form of political criticism with violent repression.[14]

Since government security forces responded with violence against peaceful protesters in the Anglophone regions of Cameroon in 2016, thousands of civilians have been killed, seven hundred thousand children have been denied the right to attend school, and more than 677,000 civilians have been displaced internally.[15] In addition, more than forty-three thousand Anglophone Cameroonians have been forced to flee to neighboring Nigeria where they face an uncertain future.[16] Unfortunately, Nigeria has not met its obligations under international law to protect these refugees. For example, at the request of the Biya regime in Cameroon, the Nigerian government forcefully repatriated forty-seven Cameroonian opposition members and sent them back to

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7. Segun, *supra* note 1.
8. *Id.*
9. *See Sub-Saharan Africa*, AMNESTY INT'L, *supra* note 6.
10. Segun, *supra* note 1.
11. *Id.*
12. *Id.*
13. *See id.*
14. Notable examples include Nigeria and Zimbabwe. *See id.*
15. *See Cameroon: Populations at Risk*, GLOB. CTR. FOR THE RESP. TO PROTECT (Dec. 1, 2022), https://www.globalr2p.org/countries/cameroon [https://perma.cc/UKY9-FEKV] (archived Dec. 19, 2022) ("OCHA estimates that at least 598,000 people have been internally displaced by violence in the north-west and south-west regions, while more than 79,600 have fled to Nigeria.").
16. *See* Anamesere Igboeroteonwu, *At Least 43,000 Cameroonian Refugees Flee to Nigeria: Local Aid Officials*, REUTERS (Jan. 25, 2018), https://www.reuters.com/article/us-cameroon-separatists-refugees/at-least-43000-cameroonian-refugees-flee-to-nigeria-local-aid-officials-idUSKBN1FE23A [https://perma.cc/7XL6-F2DM] (archived Jan. 6, 2023).

Yaoundé, Cameroon's capital.[17] A Nigerian court later ruled that the Nigerian government's actions were illegal and unconstitutional because the deportees had applied for asylum and qualified as refugees.[18]

Throughout the continent, state and non-state actors "have been implicated in massacres, targeted killings, sexual violence, burning and looting of villages, kidnappings, forced recruitment—including of children—attacks on students and teachers, and illegal occupation of schools."[19] Additionally, the inability or unwillingness of governments to hold perpetrators of human rights violations accountable for their crimes has further exacerbated the "already fragile humanitarian and human rights situation in the continent."[20]

In April 2020, Human Rights Watch released a report of its investigation into massacres in the village of Ngarbuh in Cameroon's North West Region.[21] The report revealed that on February 14, 2020, "government forces and armed ethnic Fulani killed at least 21 civilians, including 13 children and 1 pregnant woman."[22] Many observers argued that the "alleged use of ethnic militia by the government adds a dangerous new dimension to the conflict."[23] Although the Cameroonian government had initially denied that military personnel were involved in the massacre, President Biya's office later issued a statement on April 21, 2020, admitting that soldiers had taken part in the killings.[24] However, no senior military official has been held accountable for this gross human rights violation.

For many decades, the recognition and protection of human rights in Africa were relegated to "a handful of courageous and beleaguered

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17. This was done despite the fact that these forty-seven members of the opposition were asylum seekers and refugees. *See* Chidi Odinkalu & Tem Fuh Mbuh, *Where Are the 47 Political Exiles Sent by Nigeria to Cameroon?*, OPEN SOC'Y FOUNDS. (Apr. 23, 2018), https://www.opensocietyfoundations.org/voices/where-are-47-political-exiles-sent-nigeria-cameroon [https://perma.cc/77D5-9BE5] (archived Dec. 19, 2022).

18. *See* Agence France-Presse, *Nigeria Court Says Extradition of Cameroon Separatists 'Illegal'*, VOA NEWS (Mar. 3, 2019), https://www.voanews.com/a/nigeria-court-says-extradition-of-cameroon-separatists-illegal-/4811353.html [https://perma.cc/X2B6-7QHX] (archived Dec. 19, 2022).

19. Segun, *supra* note 1.

20. *Id.*

21. *Cameroon: Massacre Findings Made Public*, HUM. RTS. WATCH (Apr. 24, 2020), https://www.hrw.org/news/2020/04/24/cameroon-massacre-findings-made-public [https://perma.cc/K3RL-Q6TN] (archived Dec. 19, 2022).

22. *Id.*

23. Jess Craig, *How an 'Execution-Style' Massacre Unfolded in Cameroon*, NEW HUMANITARIAN (Mar. 3, 2020), https://www.thenewhumanitarian.org/analysis/2020/03/03/Cameroon-Ambazonia-Ngarbuh-massacre [https://perma.cc/J72A-A3FX] (archived Dec. 19, 2022).

24. *See Cameroon: Government Admits Military Involvement in February 2020 Ngarbuh Massacre*, CRISIS24 (Apr. 21, 2020), https://crisis24.garda.com/alerts/2020/04/cameroon-government-admits-military-involvement-in-february-2020-ngarbuh-massacre [https://perma.cc/CCG8-CYGB] (archived Dec. 19, 2022).

civil society activists."[25] At the same time, governments either actively engaged in the direct mistreatment of their citizens and the violation of their human rights and fundamental freedoms or failed to protect them against abuse by non-state actors. In some cases, state and non-state actors actually worked together to commit atrocities against citizens. Noteworthy examples include genocides in Rwanda[26] and the Western Darfur region of Sudan.[27]

However, in the 1990s, many African countries committed themselves to constitutionalism and the protection of human rights.[28] As interest in governance systems undergirded by the rule of law spread across the continent, the critical role played by respect for and protection of human rights in Africa's long-term peace and security, as well as economic and human development, began to gain widespread recognition.[29] In fact, many national governments, civil society organizations, and intergovernmental organizations began actively engaging in issues of human rights and how to recognize and protect them. For example, in their post-apartheid constitution, South Africans expressly referred to human rights and their protection.[30]

Earlier in June 1981, the Organisation of African Unity (OAU) had adopted the African (Banjul) Charter on Human and Peoples'

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25. Michael Fleshman, *Human Rights Move Up on Africa's Agenda*, AFR. RENEWAL (July 2004), https://www.un.org/africarenewal/magazine/july-2004/human-rights-move-africas-agenda [https://perma.cc/KKL3-FDXV] (archived Dec. 19, 2022).

26. *See generally* ERIN JESSEE, NEGOTIATING GENOCIDE IN RWANDA: THE POLITICS OF HISTORY (2017) (providing a detailed analysis of the Rwandan Genocide).

27. *See generally* GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN (Samuel Totten & Eric Markusen eds., 2006) [hereinafter GENOCIDE IN DARFUR] (presenting a series of essays that examines atrocities committed against the people of Darfur by the government in Khartoum and various non-state militias). The ongoing Darfuri genocide has killed nearly a million men, women, and children and displaced millions more. Both the Sudanese government and non-state actors, such as the Janjaweed, have been involved in perpetrating the genocide. Samuel Totten, *The U.S. Investigation into the Darfur Crisis and Its Determination of Genocide: A Critical Analysis*, *in* GENOCIDE IN DARFUR, *id*. at 199, 203 (noting reports of the burning of villages and the killing of non-Arab villagers by the Janjaweed and by Sudanese government forces). During the period 1978–1991, the Hutu-dominated *Mouvement révolutionaire national pour le Développement* (MRND) was the ruling party in Rwanda. During the period of April 7–July 15, 1994, the Interahamwe, the youth wing of the MRND, massacred almost one million Rwandans, primarily Tutsi and their Hutu sympathizers. *See* CHRISTOPHER C. TAYLOR, SACRIFICE AS TERROR: THE RWANDAN GENOCIDE OF 1994 (1999) (providing an analysis of the massacre of nearly one million Tutsi by the Interahamwe during a period of one hundred days).

28. *See generally* John Mukum Mbaku, *Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, The Responsibility to Protect, and Presidential Immunities*, S.C. J. INT'L L. & BUS., Spring Fall 2019, at 1 (providing an overview of the transition to democratic governance systems in Africa).

29. *See* Fleshman, *supra* note 25.

30. In the Preamble to their 1996 Constitution, South Africans stated as follows: "We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to: Heal the divisions of the past and establish a society based on democratic values, social justice and *fundamental human rights*." S. AFR. CONST., 1996, pmbl. (emphasis added).

Rights, which entered into force on October 21, 1986.[31] The International Federation for Human Rights (*Fédération internationale des ligues des droits de l'homme*) has noted that "[t]he creation of a coherent continental system of human rights protection in Africa responds to a broader international movement to develop regional systems of human rights protection."[32]

This movement to establish regional systems of human rights protection began with the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, followed by the American Convention on Human Rights in 1969 (which established the Inter-American Court of Human Rights).[33]

The delay in establishing human rights institutions and instruments in Africa is due, *inter alia*, to the fact that in the 1970s and 1980s, some African governments were more concerned about national sovereignty than building a supranational human rights protection system that could expose their continued violation of human rights.[34] The OAU also did not emphasize the protection of human rights.[35] In fact, the 1963 charter, which established the OAU, did not impose an explicit obligation on member states to ensure the protection of human rights and fundamental freedoms.[36]

However, by the time the Assembly of Heads of State and Government of the OAU met in Monrovia, Liberia, in 1979, they had become more receptive to the establishment of supranational systems of human rights protection. At that meeting, the delegates voted unanimously to ask the OAU Secretary General to assemble a committee of experts and charge them with drafting a regional human rights instrument for Africa, similar to the European Convention on Human Rights and the American Convention on Human Rights.[37] However,

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31. Org. of African Unity [OAU], *African (Banjul) Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter *Banjul Charter*].

32. "FIDH" is the International Federation of Human Rights. *See* INT'L FED'N FOR HUM. RTS., PRACTICAL GUIDE: THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TOWARDS THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS 19 (2010), https://www.fidh.org/IMG/pdf/african_court_guide.pdf (last visited Jan. 11, 2023) [https://perma.cc/6HBF-MUXH] (archived Jan. 11, 2023).

33. *Id.* at 19–20.

34. *See id.* at 20.

35. In fact, this failure in recognizing and protecting human rights was implicit in the OAU's "preference for socio-economic development, territorial integrity and state sovereignty over human rights protection, as well as firm reliance on the principle of non-interference in the internal affairs of member states." CTR. FOR HUM. RTS. AT THE UNIV. OF PRETORIA, A GUIDE TO THE AFRICAN HUMAN RIGHTS SYSTEM 1 (2016), https://www.pulp.up.ac.za/latest-publications/191-a-guide-to-the-african-human-rights-system-celebrating-30-years-since-the-entry-into-force-of-the-african-charter-on-human-and-peoples-rights-1986-2017 (last visited Jan. 11, 2023) [https://perma.cc/322D-W5AA] (archive Jan. 11, 2023).

36. *See id.*

37. *See id.* at 2.

some African governments continued to frustrate the adoption of a draft charter on human rights.[38]

Although threats to the charter remained, a draft charter was completed at Banjul, The Gambia, and subsequently submitted to the OAU Assembly of Heads of State and Government.[39] It is for the historic role played by The Gambia that the African Charter on Human and Peoples' Rights is also referred to as the "Banjul Charter."[40] Finally adopted in Nairobi, Kenya on June 28, 1981, the Banjul Charter entered into force on October 21, 1986, and has been ratified by most member states of the African Union (AU).[41] The AU replaced the OAU on May 26, 2001, and effectively made the rights established and guaranteed by the Banjul Charter as "the principle and objective in its Constitutive Act."[42]

The main objective of this Article is to identify advancements in the recognition and protection of human rights in Africa by examining the emerging jurisprudence of the African Court on Human and Peoples' Rights (African Human Rights Court). However, before examining cases decided by the African Human Rights Court, this Article will provide an overview of the Banjul Charter, which is the premier human rights instrument on the continent.

II. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The Banjul Charter is an international human rights instrument that was designed to provide the legal foundation for the recognition and protection of human rights and fundamental freedoms in Africa. Its drafters were influenced greatly by the legal texts of international and regional human rights protection systems and Africa's legal traditions.[43] However, the Banjul Charter has a much broader conception of human rights, "which makes it different from other conventions: it includes not only civil and political rights but also economic, social and cultural rights as well as peoples' rights."[44]

The Banjul Charter has certain unique characteristics that are worth mentioning. First, the Charter recognizes "the indivisibility of all rights: All 'generations' of rights are recognized. Socio-economic rights are justiciable."[45] The African Commission on Human and Peoples' Rights (African Commission), which was established through Article 30 of the Banjul Charter and empowered to promote human and

38. *See id.*
39. *See id.*
40. *See id.*
41. *Id.* at 3; INT'L FED'N FOR HUM. RTS, *supra* note 32, at 20.
42. INT'L FED'N FOR HUM. RTS, *supra* note 32, at 20. All member states of the AU have ratified the Banjul Charter with the exception of Morocco, which rejoined the AU in 2017 and has yet to ratify the treaty.
43. *See id.*
44. *Id.*
45. CTR. FOR HUM. RTS. AT THE UNIV. OF PRETORIA, *supra* note 35, at 5.

peoples' rights and ensure their protection in Africa, has reaffirmed the indivisibility of all rights in the case *Social Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*.[46]

In *SERAC & Another v. Nigeria*, it was alleged that Nigeria's military government had violated the rights of the Ogoni people.[47] In its ruling, the African Commission recognized the rights guaranteed by the Banjul Charter and noted that derogations by states parties are not permitted.[48] In *Media Rights Agenda & Others v. Nigeria*, the commission noted that the only limitations on the rights and freedoms guaranteed and enshrined in the Banjul Charter call for due regard to be accorded to the rights of others and collective security.[49] The commission then reaffirmed the provisions of Article 27(2), which states that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."[50] The commission also made specific reference to these provisions.[51]

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46. Social Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (May 27, 2002) [hereinafter *SERAC & Another v. Nigeria*].

47. The Applicants had claimed that "the military government of Nigeria [had] been directly involved in oil production through the State oil company, . . . and that these operations [had] caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People." *Id.* ¶ 1.

48. The African Commission stated as follows:

> Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.

Id. ¶ 68.

49. Media Rights Agenda & Others v. Nigeria, Communication 105/93, 128/94, 130/94 and 152/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (1998), ¶ 68. According to Article 27(2): "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." *Banjul Charter*, *supra* note 31, art. 27(2); *see also SERAC & Another v. Nigeria*, *supra* note 46, at ¶ 45.

50. *Bajul Charter*, *supra* note 31, art. 27(2); *see also* Media Rights Agenda & Others v. Nigeria, ¶ 68.

51. The African Commission held as follows:

> The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest.' The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.

Id. ¶¶ 68–69.

Second, the Banjul Charter recognizes "peoples' rights," such as the peoples' rights to development, the free disposal of their natural resources, as well as their right to self-determination. The African Commission confirmed peoples' rights in the case *Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* and held that "[i]n the present Communication the African Commission wishes to emphasise that the Charter recognizes the rights of peoples."[52]

Third, the Banjul Charter imposes duties on states parties, as well as on individuals. For example, states parties are expected to enact legislation or undertake other measures to give effect to "the rights, duties and freedoms enshrined" in the Banjul Charter.[53] However, there are continued violations of human rights in countries facing armed conflict (e.g., Cameroon, the Central African Republic, Chad, Ethiopia, and Nigeria), as well as in others such as Burundi, Eswatini, Rwanda, and Uganda. This indicates the need for much stronger and more robust domestic guarantees for human rights and fundamental freedoms and more effective regional human rights bodies and mechanisms.[54] It is important that victims of human rights violations are provided with effective judicial remedies at both the domestic and regional levels.

Fourth, Article 66 of the Banjul Charter empowers states parties to produce special protocols or agreements, where necessary, to "supplement the provisions of the [Banjul] Charter."[55] Since the Banjul Charter entered into force, states parties have adopted a number of protocols and conventions to supplement the provisions of the Banjul Charter, which include, for example, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[56] Human rights scholars have noted that the Maputo Protocol was "inspired by a recognised need to compensate for the inadequate protection afforded to women by the [Banjul Charter]."[57]

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52. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Feb. 4, 2010), ¶ 155.

53. *Banjul Charter*, *supra* note 31, art. 1.

54. *See generally* MAKAU WA MUTUA, THE AFRICAN HUMAN RIGHTS SYSTEM: A CRITICAL EVALUATION (2000), https://digitalcommons.law.buffalo.edu/other_scholarship/16 (last visited Jan. 11, 2023) [https://perma.cc/EPA6-LNNN] (archived Jan. 11, 2023) (emphasizing the need to provide more effective domestic guarantees for the protection of human rights in Africa).

55. *Banjul Charter*, *supra* note 31, art. 66.

56. The Maputo Protocol was adopted in Maputo, Mozambique on July 11, 2003 and entered into force on November 25, 2005. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AFR. UNION (July 11, 2003), https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa [https://perma.cc/3XUS-REN7] (archived Jan. 11, 2023) [hereinafter *Maputo Protocol*].

57. CTR. FOR HUM. RTS. AT THE UNIV. OF PRETORIA, *supra* note 35, at 6.

The Maputo Protocol is comprehensive and guarantees civil and political rights; economic, social, and cultural rights; group rights; and sexual and reproductive rights.[58] Article XIV of the Maputo Protocol guarantees "health and reproductive rights" and directs states parties "to ensure that the right to health of women, including sexual and reproductive health is respected and promoted."[59] The Maputo Protocol is the first international treaty to guarantee "sexual and reproductive rights" and also "contains innovative provisions that advance women's rights further than any existing legally binding international treaty."[60] These innovative provisions include a provision that expressly prohibits female genital mutilation and one that authorizes abortion in "cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."[61] The Maputo Protocol also contains provisions that address "violence against women, harmful traditional practices, child marriage, polygamy, inheritance, economic empowerment, women's political participation, education, and women in armed conflict."[62]

The African Committee of Experts on the Rights and Welfare of the Child, the African Commission, and the African Human Rights Court are the continent's human rights bodies and mechanisms. Although these three bodies and mechanisms work together to protect human rights in the continent, this Article is interested primarily in the African Human Rights Court.

III. THE AFRICAN COMMISSION

Although the African Commission's landmark instruments and decisions have expanded the boundaries of African human rights,[63] its

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58. *See id.*

59. *Maputo Protocol*, *supra* note 56, art. XIV.

60. CTR. FOR HUM. RTS. AT THE UNIV. OF PRETORIA, *supra* note 35, at 6.

61. *Id.*; *see also Maputo Protocol*, *supra* note 56, arts. V (prohibition of female genital mutilation), XIV(2)(c) (medical abortion permitted in cases of sexual assault, rape, incest, etc.).

62. CTR. FOR HUM. RTS. AT THE UNIV. OF PRETORIA, *supra* note 35, at 6; *see also Maputo Protocol*, *supra* note 56, arts. II (harmful traditional practices), VI (child marriage, polygamy), IX (right to political participation), XI (protection of women in armed conflict), XII (right to education and training), XIII (economic empowerment), XX (right to inheritance).

63. *See AU: Uphold Rights Body's Independence: Strengthen, Not Weaken African Commission Mandate*, HUM. RTS. WATCH (Apr. 26, 2019), https://www.hrw.org/news/2019/04/26/au-uphold-rights-bodys-independence [https://perma.cc/M5HW-ZSF2] (archived Dec. 21, 2022); *see also African Union Restricts Role of African Commission on Human & Peoples' Rights; NGOs Express Concern Over Future Accountability for Human Rights Abuses*, BUS. & HUM. RTS. RES. CTR. (Apr. 30, 2019), https://www.business-humanrights.org/de/neuste-meldungen/african-union-restricts-role-of-african-commission-on-human-peoples-rights-ngos-express-concern-over-future-accountability-for-human-rights-abuses/ [https://perma.cc/689D-ZMZQ] (archived Dec. 21, 2022).

decisions, however, become binding only after they have been approved by the AU Assembly of Heads of State and Government (AU Assembly), a process that effectively politicizes the protection of human rights on the continent. Additionally, the process through which communications are brought to the commission is quite long and the decisions that the commission takes regarding communications are often not enforced by states on a regular basis.[64] The African Commission's review of communications "is variable," but often takes too long to complete, usually between two and eight years.[65]

Most importantly, the African Commission's decisions are not legally binding and until the Interim Rules of Procedure for the Commission were adopted in 2009, there was no mechanism to monitor state implementation of these decisions.[66] These weaknesses provided the impetus for the establishment of "a real court in charge of rights guaranteed by the [Banjul] Charter with decisions binding on States."[67] However, the African Human Rights Court was expected to function as a judicial body complementing, and not replacing, the work of the African Commission. The next Part will provide an overview of the African Human Rights Court.

IV. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

In 1994, the OAU decided to draft a protocol to the African Charter establishing the African Human Rights Court.[68] A resolution was adopted in Tunis in June 1994, setting into motion preparations for the establishment of the African Human Rights Court.[69] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on January 25, 2004.[70]

However, motivated by economic considerations, the AU Assembly at their summit at Addis Ababa in July 2004 decided to merge the African Human Rights Court with the Court of Justice, the judicial

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64. *See* INT'L FED'N FOR HUM. RTS., *supra* note 32, at 26.

65. *Id.*

66. *See id.* at 27.

67. *Id.* at 28.

68. The OAU was motivated by the "institutional weaknesses [of the African Commission]," which included but were not limited to, "lack of resources, lack of binding effects of decisions and of their implementation by States," which resulted "in the relative ineffectiveness of the African Commission." *Id.* at 29.

69. *Id.* at 30. It is important to note that by June 1994, when the OAU Assembly of Heads of State and Government met in Tunis, a first draft of the African Court Protocol had already been completed by the Geneva-based NGO, International Commission of Jurists. *See id.*

70. Org. of African Unity [OAU], *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (June 10, 1998), https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and [https://perma.cc/ZN76-2CLR] (archived Jan. 4, 2023) [hereinafter *African Court Protocol*].

organ of the AU.[71] Unfortunately, "[t]he specificity of the two Courts and the functional modalities of the merger were not considered."[72]

In January 2005, the AU Assembly "decided to operationalise the African [Human Rights] Court, notwithstanding the decision of merger."[73] By January 2006, the first set of judges for the African Human Rights Court had been elected by the AU Executive Council and endorsed by the AU Assembly. Subsequently, "[t]he judges were sworn in at the Summit held in Banjul, ([The] Gambia), on 2 July 2006" and "the decision was made to seat the African [Human Rights] Court in Arusha, Tanzania."[74] The African Human Rights Court is considered an interim body, until the single court is established.[75]

The drafters of the African Court Protocol acknowledged the African Commission's role in promoting and protecting human rights in the continent and stated that the African Human Rights Court "has a mandate to supplement and enhance the mission of the African Commission."[76] In the preamble to the African Court Protocol, the drafters recognized that "the twofold objective of the [Banjul Charter] is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties" and that "the attainment of the objectives of the [Banjul Charter] requires the establishment of an [African Human Rights Court] to complement and reinforce the functions of the [African Commission]."[77]

Article 2 of the African Court Protocol states that "[t]he Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights . . . conferred upon it by the [Banjul Charter]."[78] In practice, the African Commission is able to "bring a case to the Court involving a violation of the rights of the African Charter by a State [Party] to the Protocol."[79] This mechanism is very important because it provides individuals and nongovernmental organizations (NGOs), who cannot appeal directly to the African Human Rights Court because the offending State is opposed to a direct appeal, with the opportunity to submit a matter to the African Commission with the hope that the latter could subsequently refer it to the Court.[80]

Thus, if a state party to the African Protocol has not yet made an Article 34(6) declaration "accepting the competence of the Court to receive cases under article 5(3) of [the] Protocol," the African

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71. *See* Constitutive Act of the African Union art. 5(1), July 11, 2000, 2158 U.N.T.S. 3; INT'L FED'N FOR HUM. RTS., *supra* note 32, at 31.
72. INT'L FED'N FOR HUM. RTS., *supra* note 32, at 31.
73. *Id.* at 31.
74. *Id.*
75. *Id.* at 32.
76. *Id.*
77. *African Court Protocol*, *supra* note 70, pmbl.
78. *Id.* art. 2.
79. INT'L FED'N FOR HUM. RTS., *supra* note 32, at 33.
80. *See id.*

Commission can "serve as a route to the Court."[81] As of 2020, twelve countries had made an Article 34(6) declaration accepting the competence of the Court to receive cases under Article 5(3) of the Protocol.[82] However, four of those countries have since withdrawn their declarations.[83]

The International Commission of Jurists has noted that "these withdrawal decisions serve to deprive the inhabitants of these countries access to a judicial remedy at the regional level for human rights violations, and undermine the effective[ness] of the African regional human rights system."[84] Benin and Côte d'Ivoire have "offered vague and unsubstantiated rationales for their decisions."[85] However, "their actions follow their dissatisfaction with the outcomes of particular cases against them."[86]

Another key point to note is that "only NGOs with observer status with the [African Commission] can directly apply to the Court if the State concerned by the complaint made the declaration under Article 34.6 of the Protocol."[87] The Court may also seek the opinion of the African Commission before deciding on the admissibility of a complaint.[88] The Court may, once it reaches the stage of determining the admissibility of a case, decide not to hear the case and transfer it to the

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81. *Id.*; *African Court Protocol*, *supra* note 70, art. 34(6). Article 34(6) of the African Court Protocol states as follows:

> At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.

African Court Protocol, *supra* note 70, art. 34(6). Article 5(3) states as follows: "The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol." *Id.* art. 5(3).

82. These countries are Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda, Côte d'Ivoire, Benin, Tunisia, The Gambia, Niger, and Guinea Bissau. *See Declarations*, AFR. CT. ON HUM. AND PEOPLES' RTS., https://www.african-court.org/wpafc/declarations/ (last visited Jan. 4, 2023) [https://perma.cc/ES5M-K5XV] (archived Jan. 4, 2023).

83. These countries are Tanzania, Rwanda, Côte d'Ivoire, and Benin. *See Withdrawal of States from African Court a Blow to Access to Justice in the Region*, INT'L COMM'N OF JURISTS (Jan. 5, 2020), https://www.icj.org/withdrawal-of-states-from-african-court-a-blow-to-access-to-justice-in-the-region/ [https://perma.cc/UA9S-G39K] (archived Jan. 4, 2023) [hereinafter *Withdrawal of States from African Court*].

84. *Id.*

85. *Id.*

86. *Id.*

87. INT'L FED'N FOR HUM. RTS., *supra* note 32, at 33.

88. Article 6(1) of the African Court Protocol deals with the "admissibility of cases" and states that "[t]he Court, when deciding on the admissibility of a case instituted under article 5(3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible." *African Court Protocol*, *supra* note 70, art. 6(1); *see also* INT'L FED'N FOR HUM. RTS., *supra* note 32, at 33.

commission.[89] Finally, the Court may ask the African Commission to provide an advisory opinion on any particular case before it.[90]

In the following Part, this Article examines selected decisions of the African Human Rights Court to determine the extent to which its emerging jurisprudence is impacting the recognition and protection of human rights throughout the continent.

V. THE JURISPRUDENCE OF THE AFRICAN HUMAN RIGHTS COURT AND THE PROTECTION OF HUMAN RIGHTS IN AFRICA

A. *Introduction*

In addition to protecting human rights, the African Human Rights Court also scrutinizes each African country's domestic laws and executive actions that impact human rights.[91] The Court hears cases involving the violation of the rights guaranteed by the Banjul Charter and any other human rights instruments ratified by the state concerned.[92] The Court's jurisdiction extends to "all cases and disputes submitted to it concerning the interpretation and application of the [Banjul] Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."[93] Since its inception, the Court has issued important, "progressive and ground-breaking decisions and remedies, including substantial reparations."[94]

Next, this Part will examine a few decisions of the African Human Rights Court, which have contributed significantly to building the continent's emerging human rights jurisprudence.

B. *Request for Advisory Opinion by the Pan African Lawyers Union*

The request to the African Human Rights Court for an advisory opinion was submitted by the Pan African Lawyers Union (PALU), an NGO which is located in Arusha (Tanzania) and is recognized by the

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89. *African Court Protocol*, *supra* note 70, art. 6(3).

90. *See* INT'L FED'N FOR HUM. RTS, *supra* note 32, at 33. Specifically, the following are entitled by Article 5 of the African Court Protocol to submit cases to the African Human Rights Court: "(a) The [African] Commission; (b) The State Party which has lodged a complaint to the [African] Commission; (c) The State Party against which the complaint has been lodged at the [African] Commission; (d) The State Party whose citizen is a victim of human rights violation; and (e) African Intergovernmental Organizations." *African Protocol*, *supra* note 70, art. 5(1).

91. *See* Lilian Chenwi, *Successes of African Human Rights Court Undermined by Resistance from States*, THE CONVERSATION (Aug. 31, 2021), https://theconversation.com/successes-of-african-human-rights-court-undermined-by-resistance-from-states-166454 [https://perma.cc/VU2T-YE93] (archived Jan. 4, 2023).

92. *See id.*

93. *African Court Protocol*, *supra* note 70, art. 3(1). These relevant human rights instruments include the Banjul Charter, the African Court Protocol, and other international and regional human rights instruments ratified by the States concerned.

94. Chenwi, *supra* note 91.

AU.[95] In the request, PALU noted that "a number of AU Member States retain laws which criminalise the status of individuals as being poor, homeless or unemployed as opposed to specific reprehensible acts."[96]

PALU described these laws as "vagrancy laws" and argued that many countries abuse them "to arrest and detain persons where there has been no proof of a criminal act."[97] PALU then argued that the vagrancy laws are "overly broad and confer too wide a discretion on law enforcement agencies to decide who to arrest which impacts disproportionately on vulnerable individuals in society."[98]

PALU then requested that the African Human Rights Court address four specific questions: (1) whether vagrancy laws and bylaws violate certain provisions of the Banjul Charter;[99] (2) whether vagrancy laws and bylaws violate Articles 5, 12, and 18 of the Banjul Charter and 2, 4(1), and 17 of the African Charter on the Rights and Welfare of the Child (African Child Charter);[100] (3) whether vagrancy laws and bylaws violate various provisions of the Banjul Charter, African Child Charter, and the Maputo Protocol;[101] and (4) whether states parties to the Banjul Charter "have positive obligations to repeal or amend their vagrancy laws and/or by-laws to conform with the rights protected by the [Banjul Charter, the African Child Charter, and the Maputo Protocol] and in the affirmative, determine what these obligations are."[102]

On December 18, 2018, the African Human Rights Court received amicus curiae briefs and a statement from the African Commission regarding PALU's request, and the court ultimately determined that the request was admissible.[103]

With respect to the four questions PALU brought, the Court noted that PALU had questioned "the compatibility of vagrancy laws with the [Banjul] Charter, the [African Child] Charter and the [Maputo Protocol]."[104] The Court then noted that, although "none of the three

95. Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, No. 001/2018, Advisory Opinion, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 1–2 (Dec. 4, 2020) [hereinafter Compatibility of Vagrancy Laws].

96. *Id.* ¶ 3.

97. *Id.* ¶¶ 3–4.

98. *Id.* ¶ 4.

99. *Id.* ¶ 5(a). These provisions are found in Articles 2, 3, 5, 6, 7, 12, and 18 of the Banjul Charter. *See Banjul Charter*, *supra* note 31, arts. 2, 3, 5, 6, 7, 12, 18.

100. Compatibility of Vagrancy Laws, *supra* note 95, ¶ 5(b); *see also* Org. of African Unity [OAU], *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter *African Child Charter*].

101. Compatibility of Vagrancy Laws, *supra* note 95, ¶ 5(c).

102. *Id.* ¶ 5(d).

103. *See id.* ¶¶ 10, 12; *see also* AFR. COMM'N ON HUM. & PEOPLES' RTS., PRINCIPLES ON THE DECRIMINALISATION OF PETTY OFFENSES IN AFRICA, https://www.achpr.org/legalinstruments/detail?id=2 (last visited Jan. 11, 2023) [https://perma.cc/K3BY-KBXA] (archived Jan. 11, 2023); Compatibility of Vagrancy Laws, *supra* note 95, ¶ 32.

104. *Id.* ¶ 33.

instruments has universal Pan-African ratification, the rate of ratification remains high."[105]

The Court reiterated that its main duty is to render an opinion on any legal matter relating to the interpretation of the Banjul Charter and/or any relevant regional and international human rights instruments.[106] In doing so, the Court specifically determines the compatibility of the issues raised in a request for an opinion with the Banjul Charter and other applicable regional and international human rights instruments.[107] Finally, any member state of the AU can invoke the Court's jurisdiction to render an advisory opinion.[108]

Next, the Court then examined the relationship between vagrancy laws and the right to nondiscrimination and equality. It held that vagrancy laws, both in their formulation and in their application, criminalize the status of an individual and by doing so, effectively enable discrimination against the underprivileged and marginalized. These laws also deprive individuals of their equality before the law and hence, are not compatible with Articles 2 and 3 of the Banjul Charter.[109] The Court also held that placing the labels "vagrant," "vagabond," or "rogue" on individuals, treating them in a derogatory manner, and forcefully relocating them to another area deprives them of their dignity as a human being.[110] In addition, if the order is implemented through the use of force, that may also constitute physical abuse.[111] The Court also held that "the forcible removal of persons deemed to be vagrants is not compatible with Article 5 of the [Banjul] Charter."[112]

The Court held that using vagrancy laws to arrest and detain individuals violates Article 6 of the Banjul Charter, which guarantees arrestees' right to liberty and security of person.[113] Additionally, using the vagrancy laws to arrest individuals and solicit statements "about their possible criminal culpability" violates Article 7 of the Banjul Charter.[114]

The Court held that Article 12 of the Banjul Charter guaranteeing the freedom of movement was not compatible with the vagrancy laws, including those laws in countries that permit forced relocation.[115] For-

105. *Id.* ¶ 34.
106. *See* Compatibility of Vagrancy Laws, *supra* note 95, ¶ 36.
107. *See id.*
108. This includes member states of the AU that have not yet signed and ratified the African Court Protocol. *See id.* ¶ 37.
109. *See id.* ¶¶ 75–76.
110. *Id.* ¶ 81.
111. *See id.*
112. *Id.*
113. *See id.* ¶ 87.
114. *Id.* ¶ 94.
115. *Id.* ¶ 102.

cible relocation violates the guarantee in the Banjul Charter for the sanctity of the family "as a basic unit of society."[116]

After examining amici curiae submitted by the Network of African National Human Rights Institutions, and taking note of Articles 3, 4(1), and 17 of the African Child Charter, the Court held that "the enforcement of vagrancy-related laws, which results in the arrests, detention and sometimes forcible relocation of children from the areas of residence," violates Article 3 of the African Child Charter and that the "detention and forcible relocation of children on account of vagrancy offences also infringes [children's] best interests."[117]

With respect to children's right to a fair trial, the Court held that "the arrest, detention and forcible relocation of children due to vagrancy laws is incompatible with their fair trial rights as protected under Article 17 of the [African Child] Charter."[118]

The Court next examined the compatibility of vagrancy laws with provisions of the Maputo Protocol and held "that vagrancy laws perpetrate multiple violations of the rights of poor and marginalised women."[119] The Court also held that the obligation imposed on states parties to the Banjul Charter "requires all State[s] Parties to amend or repeal all their vagrancy laws, related by-laws and other laws and regulations so as to bring them in conformity with the provisions of the [Banjul] Charter, the [African Child Charter] and [the Maputo] Protocol."[120]

PALU issued a statement applauding the holding as "a major advancement for human rights" in Africa and that because it was delivered by the AU's principal judicial organ, it holds "significant legal weight and moral authority" with the potential to completely change poor people's criminal justice outcomes.[121]

Prior to the African Human Rights Court opinion, there had been a continent-wide campaign to decriminalize or repeal petty offenses in order to alleviate the impact the vagrancy laws had on the poor.[122] PALU also celebrated the Court's findings as essential in "challenging the overly securitized response to the COVID-19 pandemic."[123]

Thus, the African Human Rights Court's advisory opinion is a significant advancement in the struggle to recognize and protect human rights in the continent. Most importantly, it adds to and strengthens

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116. *Id.* ¶ 107.
117. *Id.* ¶ 120, 123.
118. *Id.* ¶ 128.
119. *Id.* ¶ 138.
120. *Id.* ¶ 154.
121. PAN AFR. L. UNION, PALU STATEMENT ON THE DECRIMINALIZATION OF PETTY OFFENSES AND VAGRANCY LAW ISSUED BY ADVISORY OPINION OF THE AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS 1, https://lawyersofafrica.org/wp-content/uploads/Decrim-Statement-from-PALU-003.pdf (last visited Jan. 11, 2023) [https://perma.cc/CG5F-PEYG] (archived Jan. 11, 2023).
122. *Id.*
123. *Id.* at 4.

Africa's evolving human rights jurisprudence, particularly decisions in cases, such as *APDF & Another v. Mali* and *SERAC & Another v. Nigeria*,[124] which concern the protection of the rights of historically marginalized and exploited groups, such as children, the poor, minorities and Indigenous groups, women, and girls.

The violation of the rights of minorities and Indigenous peoples has become a major challenge to human rights advocates in many African countries. Some Indigenous peoples have been driven off their ancestral lands and deprived of the right to have access to their religious sites in the name of national development.

C. African Commission on Human and Peoples' Rights v. Republic of Kenya

The parties to this case are the African Commission (Applicant) and the Government of Kenya (Respondent).[125] On November 14, 2009, the African Commission received a communication from the Center for Minority Rights Development and the Minority Rights Group International, who were acting on behalf of the highly marginalized Ogiek community in Kenya.[126] The subject matter of the communication was an eviction notice, which had been issued by the Kenya Forest Service in October 2009, giving the Ogiek community and other settlers of the Mau Forest thirty days to leave their ancestral lands.[127]

Recognizing the significant and irreparable harm that could befall the Ogiek community if they were evicted, the African Commission ordered the Respondent to suspend the implementation of the order.[128] Since the Respondent failed to respond, the African Commission, on July 12, 2012, applied to the African Human Rights Court under Article 5(1)(a) of the African Court Protocol.[129]

The Applicant alleged before the Court that "the Ogieks are an indigenous minority ethnic group in Kenya" and that the "Forest

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124. *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) & The Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali*, No. 046/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (May 11, 2018), https://africanlii.org/sites/default/files/judgment/afu/african-court/2018-afchpr-15//APDF%20%26%20Anor.%20v%20Mali%20%2846%20of%202016%29.pdf [https://perma.cc/9LJ7-J6FC] (archived Jan. 6, 2023) [hereinafter *APDF & IHRDA v. Mali*]; *SERAC & Another v. Nigeria*, *supra* note 46.

125. *See* African Commission on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 1–2 (May 26, 2017) [hereinafter *African Commission v. Kenya*]. Kenya became a state party to the Banjul Charter on July 25, 2000, to the African Court Protocol on February 4, 2004, and to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on March 23, 1976. *See id.* ¶ 2.

126. *See id.* ¶ 3.

127. *See id.*

128. *See id.* ¶ 4.

129. *Id.* ¶ 5.

Service's action failed to take into account the importance of the Mau Forest for the survival of the Ogieks," or solicit and consider their input before making the decision to evict them.[130] Over the years, noted the Applicant, "the Ogieks have consistently raised objections to these evictions with local and national administrations, task forces and commissions and have instituted judicial proceedings, to no avail."[131]

The Court then examined the alleged violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the Banjul Charter, as presented by the Applicant.[132] From November 27–28, 2014, the Court held a public hearing during which all parties were represented.[133] Then, from March 9–27, 2015, the Court ordered the parties to amicably settle the matter pursuant to Article 9 of the African Court Protocol and Rule 57 of the Court's rules of procedure.[134] Since the attempt to settle the matter amicably had failed, the Court decided to adjudicate it and issue the present judgment.[135]

The Court noted that the Applicant had three prayers:

1. Halt the eviction from the East Mau Forest and refrain from harassing, intimidating or interfering with the community's traditional livelihoods;

2. Recognize the Ogieks' historic land, and issue it with legal title that is preceded by consultative demarcation of the land by the Government and the Ogiek Community, and for the Respondent to revise its laws to accommodate communal ownership of property; and

3. Pay compensation to the Ogiek Community for all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and culture.[136]

In addition to asking the Court to find that the Respondent state (Kenya) had violated Articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the Banjul Charter, the Applicant also prayed the Court to declare the Mau Forest the Ogiek's ancestral home and that "its occupation by the Ogiek people is paramount for their survival and the exercise of their culture, customs, traditions, religion and for the well-being of their community."[137] The Applicant also asked the Court to order Kenya to compensate the Ogieks for the violations of their rights.[138]

Before dealing with the merits of the application, the Court examined its jurisdiction in accordance with Rule 39(1) of the Court's rules and concluded that it had both "material" and "personal" jurisdiction

130. *Id.* ¶¶ 6, 8.
131. *Id.* ¶ 9.
132. *Id.* ¶ 10.
133. *Id.* ¶ 28.
134. *Id.* ¶ 31.
135. *Id.* ¶ 39.
136. *Id.* ¶ 41.
137. *Id.* ¶ 43(A)–(B).
138. *See id.* ¶ 43(E).

to hear the application.[139] Finally, after examining the submissions of both parties, the Court declared that it had both "temporal" and "territorial" jurisdiction to examine and hear the application.[140]

Next, the Court had to decide whether the Ogiek are an Indigenous people as argued by the Applicant. After noting that there is no universally accepted definition for Indigenous people in international human rights instruments, the Court drew inspiration from the work of the African Commission,[141] as well as that of the UN Special Rapporteur on Minorities,[142] both of which have developed criteria for identifying Indigenous populations. After reviewing these definitions for "indigenous people," the Court recognized the Ogieks as an "indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability."[143]

In this case, the Applicant averred that the failure of the Respondent to recognize the Ogieks as an Indigenous community "denies them the right to communal ownership of land as provided in Article 14 of the [Banjul] Charter."[144] The Applicant also argued that the eviction of the Ogieks and subsequent dispossession of their ancestral land "without their consent and without adequate compensation, and the granting of concessions of their land to third parties, mean that their land has been encroached upon and they have been denied benefits deriving therefrom."[145]

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139. *Id.* ¶¶ 55, 61.

140. *Id.* ¶¶ 66, 68.

141. Some of these criteria are:

> (i) Self-identification; (ii) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and (iii) A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

Id. ¶ 105 (quoting Advisory Opinion on the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Advisory Opinion, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 12 (May 2007)).

142. These criteria are: "(i) That indigenous people can be appropriately considered as 'Indigenous communities, peoples and nations which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them.'" *Id.* ¶ 106 (quoting José Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, ¶¶ 379, 381–82, E/CN.4/Sub.2/1986/7/Add.4 (1987)).

143. *Id.* ¶ 112.

144. *Id.* ¶ 114. Article 14 of the Banjul Charter states as follows: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." *Banjul Charter*, *supra* note 31, art. 14.

145. *African Commission v. Kenya*, *supra* note 125, ¶ 114.

Kenya submitted that the Ogieks cannot claim exclusive ownership of the Mau Forest since the title to all forest lands in Kenya, other than private and local authority forest, is vested in the state and that the Ogieks were actually encroaching upon a protected conservation area.[146] Additionally, the Respondent stated that the Ogieks were consulted and notified before all decisions involving them were made.[147]

The Court began its assessment of the case at bar by examining the alleged violation of Article 14 of the Banjul Charter by the Respondent. The Court noted that the right to property, which is guaranteed by Article 14, "may also apply to groups or communities" and that, in effect, "the right can be individual or collective."[148] The right to property, argued the Court, consists of three elements—namely, (i) "the right to use the thing that is the subject of the right (*usus*)"; (ii) "the right to enjoy the fruit thereof (*fructus*)"; and (iii) "the right to dispose of the thing, that is, the right to transfer it (*abusus*)."[149]

In order to "determine the extent of the rights recognised for indigenous communities in their ancestral lands as in the instant case," the Court ruled that Article 14 of the Charter must be "interpreted in light of the applicable principles especially by the United Nations."[150] The Court then cited to Article 26 of the UN General Assembly Declaration 61/295 on the Rights of Indigenous Peoples.[151]

The Court considered Article 26(2) of the UN General Assembly declaration, which emphasizes "the rights of possession, occupation, [and] use/utilization of land."[152] After reviewing its earlier declaration that the Ogieks are an Indigenous community, the Court held that on the basis of Article 14 of the [Banjul] Charter and the UN declaration that the Ogieks "have the right to occupy their ancestral lands, as well as use and enjoy the said lands."[153]

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146. *See id.* ¶ 120.
147. *See id.*
148. *Id.* ¶ 123.
149. *Id.* ¶ 124.
150. *Id.* ¶ 125.
151. *See id.* ¶ 126. Article 26 of the UN Declaration states as follows:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

G.A. Res. 61/295, art. 26, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

152. *African Commission v. Kenya*, *supra* note 125, ¶ 127.
153. *Id.* ¶ 128.

Article 14 permits restricting a right to property including land as long as such a restriction is necessary, proportional, and in the public interest.[154] The Court ruled that the Respondent did not provide any evidence to support the view that evicting the Ogieks was in the public interest.[155] In addition, argued the Court, there was no evidence that the presence of the Ogieks in the Mau Forest was the main cause of environmental degradation.[156] After concluding that eviction of the Ogieks from the Mau Forest "cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest," the Court held that the Respondent had violated the Ogieks' rights to land as guaranteed by Article 14 of the Banjul Charter "read in light of the [UN] Declaration on the Rights of Indigenous Peoples of 2007."[157]

Turning to whether Kenya violated Article 2 of the Banjul Charter, the Court emphasized the article's importance for the respect, protection and enjoyment of all other rights guaranteed by the Banjul Charter.[158] The Court argued that "[a] distinction or deferential treatment becomes discrimination, and hence, contrary to Article 2, when it does not have objective and reasonable justification and, in the circumstances where it is not necessary and proportional."[159] Kenya's laws, the Court argued, some of which were enacted during the colonial period, recognize "only the concept of ethnic groups or tribes."[160] The Court also noted that available records show that the Ogieks' request to be recognized as a tribe "goes back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933."[161]

The Court concluded that the denial of the Ogieks' request for recognition as a tribe had also deprived them of "access to their own land as, at the time, only those who had tribal status were given land as 'special reserves' or 'communal reserves.'"[162] Unlike the Ogieks, other groups within Kenya (e.g., the Maasai) have been recognized as tribes and have "been able to enjoy all related rights derived from such recognition, thus proving differential treatment."[163]

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154. *Id.* ¶ 129.
155. *See id.* ¶ 130.
156. *See id.*
157. *Id.* ¶¶ 130–31.
158. Article 2 states as follows: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." *Banjul Charter*, *supra* note 31, art. 2; *see also African Commission v. Kenya, supra* note 125, ¶ 137.
159. *Id.* ¶ 139.
160. *Id.* ¶ 140.
161. *Id.* ¶ 141.
162. *Id.*
163. *Id.*

The Court compared Kenya's (or the Respondent's) treatment of other Indigenous groups that led a traditional way of life, distinct in their dependence on the natural environment, just like the Ogieks, to its treatment of the Ogieks. While these other groups were recognized by Kenya and granted their rights as Indigenous peoples, the Ogieks were neither recognized nor granted the same rights. By failing to recognize the Ogieks' status as a distinct tribe like other similar groups and thereby denying them the rights available to other Indigenous groups, Kenya had violated Article 2 of the Banjul Charter.[164]

The Court then noted that Kenya's 2010 Constitution recognizes Indigenous groups and grants them special rights as marginalized communities. The Ogieks, thus, could benefit from the constitutional protections granted marginalized communities since they are such a community. However, the Court held that these constitutional guarantees do not diminish the responsibility of Kenya to ensure that the right of the Ogieks not to be discriminated against was upheld "between the time the Respondent became a Party to the [Banjul] Charter and when the Respondent's new Constitution was enacted."[165]

The Court next examined an alleged violation of Article 4 of the Banjul Charter.[166] Noting that the right to life is the "cornerstone on which the realisation of all other rights and freedoms depend," the Court argued that depriving a person of his or her life "amounts to eliminating the very holder of these rights and freedoms."[167]

The Court then referred to Article 4 of the Banjul Charter, which "strictly prohibits the arbitrary deprivation of life" and, contrarily to other human rights instruments, "establishes the link between the right to life and the inviolable nature and integrity of the human being."[168] The Court held that "this formulation reflects the indispensable correlation between these two rights."[169] In the final analysis, however, the Court found that Kenya had not violated Article 4 of the Banjul Charter.[170]

Kenya was also accused of violating Article 8 of the Banjul Charter.[171] The Applicants had argued that "the Ogieks practise a monotheistic religion closely tied to their environment" that is not only

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164. *See id.* ¶ 142.

165. *Id.* ¶ 143.

166. *See id.* ¶ 151. Article 4 states as follows: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." *Banjul Charter*, *supra* note 31, art. 4.

167. *African Commission v. Kenya*, *supra* note 125, ¶ 152.

168. *Id.*

169. *Id.*

170. *See id.* ¶ 156. The Court held that the Applicant had failed to adduce evidence that establishes "the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result." *Id.* ¶ 155.

171. *See id.* ¶ 157. Article 8 states that "[f]reedom of conscience, the profession and free practice of religion shall be guaranteed" and that "[n]o one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." *Banjul Charter*, *supra* note 31, art. 8.

protected by Article 8 of the Banjul Charter but is also a religion under international law.[172] The Ogieks' beliefs and spiritual practices are not, as argued by Kenya, a threat to law and order.[173]

After noting Kenya's argument that the Ogieks had abandoned their religion (which was a threat to law and order) and converted to Christianity, the Court found that the Ogieks' eviction from the Mau Forest is the reason why they can no longer engage in their religious practices, especially given the annual license that they must apply for and pay in order to have access to the forest.[174] The Court concluded that Kenya's eviction measures and "these regulatory requirements interfere with the freedom of worship of the Ogiek population" and are a violation of Article 8 of the Banjul Charter.[175]

Kenya was also accused of violating Articles 17(2) and (3) of the Banjul Charter.[176] In its submission to the court on Articles 17(2) and (3), the Applicant cited to the *Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, African Commission Communication* case,[177] particularly in reference to the definition of culture, and argued that "the Ogieks should be allowed to determine what culture is good for them rather than the Respondent doing so" and urged the Court to draw inspiration from "Article 61 of the [Banjul] Charter" and "to find that the Respondent is in violation of Article 17 of the Charter in respect of the Ogiek" and, accordingly, issue "an Order for reparation."[178]

Kenya, however, argued that it recognizes and affirms the provisions of Article 17 of the Banjul Charter and that it has taken "reasonable steps both at the national and international levels" to ensure that the cultural rights of Kenya's Indigenous groups are recognized and protected.[179] Kenya also stated that it had already ratified multiple human rights treaties as well as included provisions that protect cultural rights in its constitution.[180]

In its assessment of the right to practice one's culture, the Court noted that "[t]he protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires

172. *African Commission v. Kenya*, *supra* note 125, ¶ 157.

173. *Id.*

174. *Id.* ¶¶ 161, 166.

175. *Id.* ¶¶ 166, 169.

176. *See id.* ¶ 171. Article 17(2) of the Banjul Charter states that "[e]very individual may freely, take part in the cultural life of his community," and Article 17(3) states that "[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State." *Banjul Charter*, *supra* note 31, art. 17(2)–(3).

177. *See id.* ¶ 170; *see also* Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya, Communication 276/2003, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Feb. 4, 2010).

178. *African Commission v. Kenya*, *supra* note 125, ¶ 171.

179. *Id.* ¶ 173.

180. *See id.* These treaties include the ICCPR and the ICESCR.

respect for, and protection of, their cultural heritage essential to the group's identity."[181] Thus, argued the Court,

> culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality.[182]

After citing to the UN Declaration on Indigenous Peoples, as well as to the General Comments of the Committee on Economic, Social and Cultural Rights on Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights, the Court found that Kenya had violated Article 17(2) and (3)'s right to culture because it had evicted the Ogieks from the Mau Forest, thereby, "restricting them from exercising their cultural activities and practices."[183]

Kenya was also alleged to have violated the rights of the Ogieks "to freely dispose of their wealth and natural resources" by denying them access to the Mau Forest and depriving them of the forest's vital resources and by "granting logging concessions on [their] ancestral land without their prior consent and without giving them a share of the benefits in those resources."[184]

The relevant question before the Court was "whether the enjoyment of the rights unquestionably recognised for the constituent peoples of the population of a given State can be extended to include sub-state ethnic groups and communities that are part of that population."[185] In other words, does "people," as used in Article 21, refer only to the population of Kenya as a whole or does it also apply to the Ogieks, a community or ethnic group within Kenya? The Court held in the affirmative, with the proviso that "such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent."[186]

The Court reiterated that it had already recognized for the Ogieks "a number of rights to their ancestral land, namely, the right to use (*usus*) and the right to enjoy the produce of the land (*fructus*), which presuppose the right of access to and occupation of the land."[187] The Court then held that Kenya had violated Article 21 because the Ogieks

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181. *Id.* ¶ 179.

182. *Id.*

183. *Id.* ¶¶ 181, 190 (citing UNDRIP, *supra* note 151, art. 8; Comm. on Econ., Soc. and Cultural Rts., General Comment No. 21, U.N. Doc. E/C.12/GC/21, ¶¶ 36–37 (Dec. 21, 2009)).

184. *African Commission v. Kenya*, *supra* note 125, ¶ 191; *see also Banjul Charter*, *supra* note 31, art. 21.

185. *African Commission v. Kenya*, *supra* note 125, ¶ 198.

186. *Id.* ¶ 199.

187. *Id.* ¶ 201 (emphasis in original).

had been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands."[188]

The Applicant also alleged that Kenya had violated the Ogieks' "right to development by evicting them from their ancestral land in the Mau Forest and by failing to consult with and/or seek the consent of the Ogiek Community in relation to the development of their shared cultural, economic and social life within the Mau Forest," as guaranteed by Article 22 of the Banjul Charter.[189]

The Court reaffirmed that Article 21's "peoples" includes all populations as a "constitutive element of a State," entitled to social, economic and cultural development.[190] Thus, argued the Court, the Ogiek population "has the right under Article 22 of the [Banjul] Charter to enjoy their right to development."[191] The Court then held that Kenya had violated Article 22 of the Banjul Charter.[192]

Finally, Kenya was also alleged to have violated Article 1 of the Banjul Charter.[193] The Applicant urged the Court to "apply its own approach and that of the [African] Commission in respect of Article 1 of the [Banjul] Charter, that if there is a violation of any or all of the other Articles pleaded, then it follows that the Respondent is also in violation of Article 1."[194] The Court noted that Article 1 of the Banjul Charter imposes an obligation on states parties "to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the Charter."[195]

Although the Respondent had taken some legislative measures to ensure the enjoyment of the rights and freedoms guaranteed its citizens in the Banjul Charter, noted the Court, it had failed to recognize the Ogieks, "like other similar groups, as a distinct tribe, leading to denial of access to their land in the Mau Forest and the consequential violation of their rights under Article[s] 2, 8, 14, 17(2) and (3), 21 and 22."[196]

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188. *Id.*

189. *Id.* ¶ 202. Article 22 of the Banjul Charter states as follows:

> 1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Banjul Charter, *supra* note 31, art. 22.

190. *African Commission v. Kenya*, *supra* note 125, ¶ 208.

191. *Id.*

192. *See id.* ¶ 211.

193. *See id.* ¶ 212. Article 1 states as follows: "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them." *Banjul Charter*, *supra* note 31, art. 1.

194. *African Commission v. Kenya*, *supra* note 125, ¶ 212.

195. *Id.* ¶ 215.

196. *Id.* ¶ 216.

Finally, noted the Court, "the Respondent has not demonstrated that it has taken other measures to give effect to these rights."[197] In conclusion, the Court found that even though Kenya had taken some legislative measures, they were not enough to give effect to the rights enshrined in various provisions of the Banjul Charter. Hence, Kenya had violated Article 1 of the Banjul Charter.[198]

The Court concluded by issuing five orders regarding the merits of the case but left remedies and reparations for a separate decision.[199]

The African Human Rights Court's decision in *African Commission v. Kenya* formally recognized the Ogiek peoples' collective right to their ancestral lands located in the Mau Forest in Kenya's Rift Valley. In addition, the decision gave hope to other Indigenous groups and communities throughout Africa, whose rights to live in peace and security in their ancestral lands are being violated by national and sub-national governments, as well as multinational companies, all in the name of development and ecosystem and environmental conservation.

D. Association pour le progrès et la défense des droits des femmes maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali

The parties to this case were the *Association pour le progrès et la défense des droits des femmes maliennes* (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) ("Applicants") and the Republic of Mali.[200]

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197. *Id.*

198. *See id.* ¶ 217.

199. The five orders were:

> i) Declares that the Respondent has violated Articles 1, 2, 8, 14 17(2) and (3), 21 and 22 of the Charter;
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> ii) Declares that the Respondent has not violated Article 4 of the Charter;
>
> iii) Orders the Respondent to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this Judgment;
>
> iv) Reserves its ruling on reparations;
>
> v) Requests the Applicant to file submissions on Reparations within 60 days from the date of this judgment and thereafter, the Respondent shall file its Response thereto within 60 days of receipt of the Applicant's submissions on Reparations and Costs.

Id. ¶ 227.

200. *APDF & IHRDA v. Mali*, *supra* note 124, ¶¶ 1–4. The Republic of Mali is a State Party to most of the major human rights instruments, including the *Banjul Charter*; *African Court Protocol*; *Maputo Protocol*; *African Child Charter*; and the Convention on the Elimination of All Forms of Discrimination against Women, *infra* note 202. *See APDF & IHRDA v. Mali*, *supra* note 124, ¶ 4.

The Applicants alleged that Mali had violated (i) the minimum age for marriage for girls,[201] (ii) the right to consent to marriage,[202] (iii) the right to inheritance,[203] and (iv) the obligation to eliminate traditional practices and conduct harmful to the rights of women and children.[204]

The Court noted that the Applicants had thirteen prayers, including that the Court order the respondent (Mali) to "[a]mend its Persons and Family Code by bringing back the minimum age of marriage for girls to 18," "[e]liminate the provisions of the Family Code which allow for age exemptions," "[a]mend Articles 283 to 287 of the Family Code to establish similar conditions of consent for marriages contracted before a religious minister."[205]

The Court found that it had jurisdiction since Mali is a party to the African Court Protocol and has filed an Article 34(6) declaration. In addition, the alleged facts occurred after the protocol had entered into force, and the alleged violations occurred in Mali's territory.[206] Finally, the Court held as follows: "In view of the foregoing considerations, the Court holds in conclusion that it has jurisdiction to hear this case."[207]

The Court then moved on to examine the issue of the admissibility of the application. It cited to Article 6(2) of the African Court Protocol, which grants the Court the power to rule on issues regarding the admissibility of cases before the Court, "taking into account the provisions of article 56 of the [Banjul] Charter."[208] The Court then held that "the only remedy which the Applicants could have utilised is that of filing a Constitutional Petition against the impugned law" before the Constitutional Court, which, according to Article 85 of the Constitution of Mali, is the appropriate authority to determine the constitutionality of laws.[209]

Taking into consideration Article 88 of Mali's Constitution and Article 45 of Law No. 97–010, the Court found that human rights NGOs

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201. *Id.* ¶ 9. This violation concerns Article 6(b) of the Maputo Protocol and Articles 1(3), 2, and 21 of the African Child Charter. *See Maputo Protocol*, *supra* note 56, art. VI(b); *African Child Charter*, *supra* note 100, arts. 1(3), 2, 21.

202. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 9; *see Maputo Protocol*, *supra* note 56, art. VI(a); G.A. Res. 34/180, art. 16(a)–(b), Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW].

203. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 9; *see Maputo Protocol*, *supra* note 56, art. XX(2); *African Child Charter*, *supra* note 100, arts. 3–4 (prohibiting discrimination on the basis of birth and requiring the best interests of the child standard).

204. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 9; *see Maputo Protocol*, *supra* note 56, art. II(2); CEDAW, *supra* note 202, art. 5(a); *African Child Charter*, *supra* note 100, art. 1(3).

205. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 16.

206. *Id.*

207. *Id.* ¶ 30.

208. *Id.* ¶ 31 (quoting *African Court Protocol*, *supra* note 70, art. 6(2)).

209. *APDF & IHRDA v. Mali*, *supra* note 124, ¶¶ 39–40; *see also* CONSTITUTION OF THE REPUBLIC OF MALI, 1992, art. 85.

did not have any avenue to the country's Constitutional Court.[210] Thus, concluded the Court, there was no remedy available to the Applicants in Mali.[211] The Court then dismissed "the objection to the admissibility of the Application for non-exhaustion of local remedies raised by [Mali]."[212]

Mali had argued that the human rights NGOs had waited for five years after the promulgation of the impugned law before bringing the matter before the Court and the Applicants had failed to "adduce any argument to justify this particularly long timeframe in filing the case before the Court."[213] The Applicants, however, submitted that "the alleged violations [were] 'continuing' and that, in the circumstances, the period can start to count only after the cessation of the said violations."[214]

The Court held that the reasonableness of time to file should be based on the Applicants' knowledge of the impugned law.[215] The Court then cited to the European Court of Human Rights case *Dennis and Others v. United Kingdom*, in which the Court held that, "where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the act at issue, or from the date of knowledge of that act or its effect on or prejudice to the applicant."[216]

In deciding the reasonableness of the Applicants' five-year delay, the Court noted two important elements: the time needed to determine the law's compatibility with the international human rights treaties to which Mali is a party, and the hostile environment, including intimidation and threats, that existed in Mali after the law came into effect. These factors, noted the Court, could be expected to have impacted the Applicants.[217] Acknowledging that Mali during this period was in political and social crisis characterized by protests by religiously-based movements, the Court then dismissed "the objection to the admissibility of the Application for failure to abide by a reasonable time limit in submitting the Application to the Court."[218]

The first alleged violation that the Court examined was related to the minimum age for marriage. The Applicants had noted that the provision of the impugned law, which established the Family Code, had set the minimum age for marriage at eighteen years for boys and sixteen years for girls.[219] This, however, was in contrast to Article 6(b) of the Maputo Protocol, which sets the marriage age for girls at eighteen

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210. *APDF & IHRDA v. Mali*, *supra* note 124, ¶¶ 42–43.
211. *Id.* ¶ 44.
212. *Id.* ¶ 45.
213. *Id.* ¶ 46.
214. *Id.* ¶ 47.
215. *See id.* ¶ 50.
216. *Id.* ¶ 51 (citing Dennis and Others v. United Kingdom, App. No. 76573/01, at 6 (July 2, 2002)).
217. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 54.
218. *Id.* ¶¶ 54–55.
219. *See id.* ¶ 59.

years.[220] The Applicants also submitted that the impugned law grants special permission for a boy of fifteen to marry with the mother's and father's consent and a girl of fifteen to marry with the father's consent only.[221]

The Court then examined the various provisions of the Maputo Protocol and the African Child Charter related to the definition of a child, the marriage age for girls, and the need to eliminate social and cultural practices that affect the welfare, dignity, normal growth, and development of the child.[222] According to the Court, these provisions impose an obligation on states parties to take all appropriate measures to abolish customs and practices that harm children, including discrimination against children born out of wedlock for reasons of their gender.[223] The states parties were also required to take measures to guarantee the minimum age for marriage at eighteen years.[224] The Court then held that

> it lies with the Respondent State to guarantee compliance with the minimum age of marriage, which is 18 years, and the right to non-discrimination; [and] that having failed to do so, the Respondent State has violated Article 6 (b) of the Maputo Protocol and Articles 2, 4 (1) and 21 of the [African Child] Charter.[225]

With respect to the authority granted to religious ministers and civil registry officials by the impugned law to perform marriages, the Applicants argued that the same law provides for sanctions against civil registry officials who do not verify the consent of the parties for marriage.[226] However, similar sanctions are not imposed on religious leaders who do not undertake the necessary verification before performing a marriage.[227] More importantly,

> the way religious marriages are performed in Mali poses considerable risk, given that the marriages are forced, in as much as they are generally celebrated without the presence of the parties; that the marriages consist in the two families exchanging kola nuts in the presence of a specialist of the Muslim religion; that even if these marriages are performed in the mosque, the presence of women is not required; that this practice, combined with traditional attitudes which encourage the marriage of the girl at puberty, is fraught with considerable risk as the marriages are performed without the consent of the girl.[228]

In its analysis, the Court noted that Article 6(a) of the Maputo Protocol imposes an obligation on states parties to ensure that women

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220. *See id.* Article 6(b) states that "[t]he minimum age of marriage for women shall be 18 years." *Maputo Protocol*, *supra* note 56, art. VI(b).
221. *See APDF & IHRDA v. Mali*, *supra* note 124, ¶ 60.
222. *See id.* ¶¶ 71–78; *see, e.g.*, *African Child Charter*, *supra* note 100, art. 21.
223. *See APDF & IHRDA v. Mali*, *supra* note 124, ¶ 75.
224. *Id.* ¶ 75.
225. *Id.* ¶ 78.
226. *Id.* ¶ 79–80.
227. *See id.*
228. *Id.* ¶ 82.

and men are guaranteed equal rights and "are regarded as equal partners in marriage."[229] In addition, states parties are also required to "enact appropriate national legislative measures to guarantee that . . . no marriage shall take place without the free and full consent of both parties."[230] Finally, noted the Court, the Maputo Protocol and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), international treaties which Mali has ratified, contain provisions that "set down principles of free consent in marriage."[231] However, "the extant Family Code envisages the application of Islamic law (Article 751) and entitles religious ministers to celebrate marriages, but does not require them to verify the free consent of the parties."[232]

After acknowledging the discrepancies of the Family Code's verification requirements and the imposition of sanctions on civil registry officials but not on religious leaders who conduct marriages without verification of the consent of the parties, the Court emphasized the risks that religious marriages have in Mali: they "may lead to forced marriages and perpetuate traditional practices that violate international standards which define the precise conditions regarding age of marriage and consent of the parties[] for a marriage to be vaid."[233]

Finally, noted the Court, "in the procedure for [the] celebration of marriage, the impugned law allows for the application of religious and customary laws on the consent to marriage" and also "allows for different marriage regimes depending on whether it is celebrated by a civil officer or a religious minister—practices not consistent with international instruments, namely: the Maputo Protocol and CEDAW."[234]

In their submissions to the Court, the Applicants also alleged that

> the impugned law enshrines religious and customary law as the applicable regime, by default, in matters of inheritance, in as much as the provisions of the new Family Code apply only "where religion or custom has not been established in writing, by testimony, experience or by common knowledge or where the deceased, in his life time, has not manifested in writing or before witnesses his wish that his inheritance should be distributed otherwise" (Article 751 of the Family Code).[235]

Regarding the rights of women, noted the Court, the Applicants maintained that in Mali, Islamic law grants a woman only half of what is inherited by a man. In addition, most Malians do not have access to a notary that can authenticate a will. The country has about forty no-

229. *Id.* ¶ 89; *see also Maputo Protocol*, *supra* note 56, art. VI(a) (requiring mutual consent to marriage).
230. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 89.
231. *Id.* ¶ 90.
232. *Id.* ¶¶ 90–91.
233. *Id.* ¶ 94.
234. *Id.* ¶ 95.
235. *Id.* ¶ 96.

taries to serve a population of more than 15 million people.[236] The Applicants then concluded that "in adopting the impugned law, [Mali] violated Article 21 of the Maputo Protocol which provides that '[a] widow shall have the right to an equitable share in the inheritance of the property of her husband. . . . Women and men shall have the right to inherit, in equitable shares, their parents' properties.'"[237]

The CEDAW Committee, noted the Applicants, "has also declared that practices which do not give women the same share of inheritance as men constitute a violation of CEDAW."[238] With respect to children, noted the Applicants, under Mali's new Family Code, "children born out of wedlock do not have the right to inheritance and that they may be accorded inheritance only if their parents so wish and the conditions set out in Article 751 of the Family Code have been met."[239]

Finally, the Applicants submitted that

> although the new [Family] Code provides for equal share of inheritance between the legitimate child and the child born out of wedlock[,] where inheritance is governed by the provisions of the Family Code, this right is rendered illusory by the application of the customary or religious regime as the law applicable in the absence of a will to the contrary; that the regime applicable to most children born out of wedlock in Mali remains the customary or religious law, and that in the circumstances, the right to inheritance is no longer a right but a favour for children born out of wedlock in Muslim families.[240]

The Applicants then "pray[ed] the Court to rule that, by legalising discrimination against women and children born out of wedlock, [Mali] had violated Article 21 of the Maputo Protocol, Article 4 of the [African Child] Charter and Article 16(h) of the CEDAW."[241] The Court began its analysis by citing to Article 21 of the Maputo Protocol, which guarantees a widow the right to inherit the property of her husband.[242] With respect to children, the Court cited to Article 3 of the African Child Charter, which guarantees every child the enjoyment of all the rights provided in the Charter, and Article 4(1), which requires that "the best interests of the child shall be the primary consideration" on all actions taken by anyone concerning the child.[243]

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236. *See id.* ¶ 97.

237. *Id.* ¶ 98 (quoting *Maputo Protocol*, *supra* note 56, art. XXI).

238. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 99.

239. *Id.* ¶ 100.

240. *Id.* ¶ 102.

241. *Id.* ¶ 107.

242. *Id.* ¶ 108. Article 21(1) states that "[a] widow shall have the right to an equitable share in the inheritance of the property of her husband. . . . Women and men shall have the right to inherit, in equitable shares, their parents' properties." *Maputo Protocol*, *supra* note 56, art. XXI.

243. *APDF & IHRDA v. Mali*, *supra* note 124, ¶¶ 72, 109. Article 3 states that "[e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion,

The African Child Charter, the Court noted, makes no "distinction" between children when it comes to inheritance.[244] The Court then stated that "Article 751 of the Family Code stipulates that: '[i]nheritance shall be devolved according to the rules of religious law or the provisions of this Code'" and that "in matters of inheritance, Islamic law gives to the woman half of the inheritance a man receives, and that children born out of wedlock are entitled to inheritance only if their parents so desire."[245] The Malian legislature, the Court argued, did not consider the best interests of the child when it drafted the Family Code's provisions on inheritance, a clear violation of Article 4(1) of the African Child Charter.[246]

The Court found that the Islamic law that currently governs matters of inheritance and customary practices in Mali do not conform with the international human rights instruments ratified by Mali.[247] Therefore, the Court held that Mali had violated Article 21(2) of the Maputo Protocol and Articles 3 and 4 of the African Child Charter.[248]

Finally, the Applicants had alleged that

> by adopting the impugned law, the Respondent State [had] demonstrated a lack of willingness to eliminate the traditional practices that undermine the rights of women and girls, and children born out of wedlock, especially early marriage, the lack of consent to marriage, the unequal inheritance—all in contravention of Article 1 of the [African Child] Charter.[249]

The Court examined the obligations imposed on states parties by the Maputo Protocol, CEDAW, and the African Child Charter to eliminate all harmful cultural and traditional practices that are undergirded by the idea of the inferiority of women.[250] Acknowledging that the Family Code had violated various international treaty provisions regarding the marriage age, consent to marriage, and the inheritance rights of women and children born out of wedlock, the Court held that

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national and social origin, fortune, birth or other status." *African Child Charter*, *supra* note 100, art. 3. Article 4(1) states that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." *African Child Charter*, *supra* note 100, art. 4(1).

244. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 109.

245. *Id.* ¶¶ 111–12.

246. *See id.* ¶ 113.

247. *See id.* ¶ 114.

248. *See id.* ¶ 115.

249. *Id.* ¶ 116.

250. *Id.* ¶¶ 120–23; *see*, *e.g.*, *Maputo Protocol*, *supra* note 56, art. II(2) (imposing an obligation to "modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men"); CEDAW, *supra* note 202, art. 5(a); *African Child Charter*, *supra* note 100, art. 21(1).

these discriminatory practices "undermine the rights of women and children" and accordingly violate Mali's international obligations.[251]

The Court then held as follows: "In view of the foregoing, the Court holds that the Respondent State has violated Article 2 (2) of the Maputo Protocol, Articles 1 (3) and 21 of the [African Child] Charter and Article 5 (a) of CEDAW."[252]

In addition, the Court held unanimously that Mali must amend the impugned law and harmonize its laws so that they conform to provisions of international human rights instruments.[253] Finally, the Court ordered Mali "to comply with its obligations under Article 25 of the [Banjul] Charter with respect to information, teaching, education and sensitisation of the populations"[254] and

> to submit to it a report on the measures taken in respect of [the order for Mali to amend the impugned law, end the violations established by the court, bring its laws into conformity with international human rights instruments, and meet its obligations under Article 25 of the Banjul Charter] within a reasonable period which, in any case, should not be more than two (2) years from the date of this Judgment.[255]

The African Human Rights Court's decision in *ADPF & IHRDA v. Republic of Mali* is very important for several reasons. First, this case gave the Court the opportunity to deal with human rights issues (e.g., child marriage, inheritance rights of women and children born out of wedlock, and traditional practices that harm women and girls) that many African countries are often unable or unwilling to deal with. As evident from this case, Malian legislators were unable to enact a Family Code that reflects the provisions of international human rights instruments, including the Banjul Charter. This was due to opposition from domestic groups that believe that such laws would interfere with their ability to practice their religion and traditions.[256] These groups, as happened in Mali with nationwide violent protests by Muslims against the first Family Code, not only make it difficult for legislators to enact necessary legislation as mandated by various international

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251. *APDF & IHRDA v. Mali*, *supra* note 124, ¶ 124.
252. *Id.* ¶ 125.
253. *See id.* ¶ 135(x).
254. *Id.* ¶ 135(xii) (emphasis removed).
255. *Id.* ¶ 135(xiii) (emphasis removed).
256. *See id.* ¶ 54 (noting the violent protests by religious groups and the existence of a "climate of fear, intimidation and threats" in Mali following the adoption of a law that would broaden and increase women's rights); *see also Malian Muslims protest against family law revision, 2009*, GLOB. NONVIOLENT ACTION NETWORK, https://nvdatabase.swarthmore.edu/content/malian-muslims-protest-against-family-law-revision-2009 (last visited Feb. 10, 2023) [https://perma.cc/8P4K-N8XZ] (archived Feb. 10, 2023) (noting that on August 22, 2009, thousands of Malian Muslims protested against a proposed law that would have expanded and improved protections for women's rights in the country).

human rights instruments, but they can also prevent local courts from enforcing laws designed to protect the rights of women and girls.

Second, although many African countries have ratified the major international and regional human rights instruments, including the Banjul Charter, the African Child Charter, CEDAW, and the Maputo Protocol, they have not yet domesticated them to create rights that are justiciable in national courts. This implies that the provisions of these treaties cannot be applied or enforced by domestic courts when necessary. There may be a way out of this dilemma depending on whether a country has made a declaration under the African Court Protocol's Article 34(6) to provide the Court with the jurisdiction to directly receive cases from individuals and NGOs.[257]

The jurisdiction of the African Human Rights Court extends to "all cases and disputes" that have been submitted to it regarding the interpretation and application of the Banjul Charter and other relevant human rights instruments ratified by the States concerned.[258] International human rights scholars have argued that international and regional human rights courts often make use of each other's jurisprudence, and the African Human Rights Court has adopted this approach in several of its cases.[259]

However, Article 3 enables the African Human Rights Court to go further to find not only violations of the Banjul Charter but also those of relevant regional and international human rights instruments. Thus, the Court was willing to rule on violations of the International Covenant on Civil and Political Rights (ICCPR) and the Economic Community of West African States Treaty,

> even where the State has not ratified the Optional Protocol permitting the Human Rights Committee jurisdiction to examine individual complaints; and having found a violation of a particular right in the [Banjul] Charter has then gone on automatically to conclude that this was also a violation of the right in the ICCPR given that the latter "guarantees in the same manner" the right in the [Banjul] Charter.[260]

The African Human Rights Court is one of two legal institutions empowered to protect human rights in Africa, as well as rule on the interpretation and application of the Banjul Charter and other relevant human rights treaties, including international instruments. The other legal institution is the African Commission on Human and Peoples' Rights, which has a more expansive mandate. Since their es-

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257. *See, e.g.*, Rachel Murray, *The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights*, *in* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLE'S RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 965, 967–69 (Charles C. Jalloh et al. eds., 2019) (examining the issue of the jurisdiction of the African Human Rights Court).

258. *African Court Protocol*, *supra* note 70, art. 3(1).

259. *See* Murray, *supra* note 257, at 972.

260. *Id.*

tablishment, both have been instrumental in producing a relatively progressive human rights jurisprudence that involves the right to a fair trial; equality before the law; right not to be discriminated against; right to liberty and security; right to dignity and freedom from slavery, torture, and other ill-treatment; right to freedom of movement and residence; right to work; right to family; right to life; right to participate in politics and to access public services; and right to nationality. Thus, both institutions are a very important part of the human rights architecture in Africa.

Despite the African Human Rights Court's substantive and progressive jurisprudence, which has distinguished it as the premier human rights institution on the continent, this Court continues to face significant threats to its operations and continued existence. In the Part that follows, this Article will examine some of these threats.

VI. THREATS TO THE AFRICAN HUMAN RIGHTS COURT

A. *Introduction*

In a 2020 study, Amnesty International determined that African governments' unwillingness to comply with the decisions of the African Human Rights Court, financially support the Court, and apprise it of human rights violations occurring in their jurisdictions is threatening the Court's continued viability.[261] Netsanet Belay, AI's Director for Research and Advocacy, has argued that the mechanisms established to ensure the recognition and protection of human rights in the continent are facing enormous challenges.[262] Of course, given the extent to which human rights continue to be violated with impunity by state and non-state actors throughout the continent, human rights bodies in Africa are critically important and must be protected and provided with all the resources that they need to function effectively.[263]

The AI study specifically raised alarm about the future of the African Human Rights Court, noting that the Court's existence was in jeopardy after three countries—Benin, Côte d'Ivoire, and Tanzania—had decided to withdraw their Article 34(6) declarations, effectively rendering the Court incapable of directly receiving cases under Article

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261. *See* AMNESTY INT'L, THE STATE OF AFRICAN REGIONAL HUMAN RIGHTS BODIES AND MECHANISMS 2019–2020, 37–38, 41–42, 47 (Oct. 21, 2020), https://www.amnesty.org/en/documents/afr01/3089/2020/en/ [https://perma.cc/5C4M-D3WW] (archived Jan. 12, 2023).

262. *See Africa: Regional Human Rights Bodies Struggle to Uphold Rights Amid Political Headwinds*, AMNESTY INT'L (Oct. 21, 2020), https://www.amnesty.org/en/latest/news/2020/10/africa-regional-human-rights-bodies-struggle-to-uphold-rights-amid-political-headwinds-2/ [https://perma.cc/2XFP-HZDH] (archived Jan. 13, 2023) [hereinafter *Africa: Regional Human Rights Bodies Struggle*].

263. *See id.* These human rights bodies include the African Human Rights Court.

5(3) of the African Court Protocol from these countries.[264] At the time that it ratifies the African Court Protocol, or at any time after ratification, a state can make an Article 34(6) declaration "accepting the competence of the Court to receive cases under Article 5 (3) of [the] Protocol."[265] Unless a state makes this declaration, the Court "shall not receive any petition under article 5 (3) involving such a state party."[266]

Tanzania withdrew its Article 34(6) declaration in November 2019, "misleadingly claiming that the [C]ourt had entertained matters that should have been handled by national courts."[267] Benin and Côte d'Ivoire withdrew their Article 34(6) declarations in March and April 2020, respectively.[268] African countries, concluded Amnesty International, must refrain from taking actions against the Court that will threaten its existence.[269]

As of 2022, the Banjul Charter has been ratified by all African countries except Morocco.[270] However, the African Court Protocol has not yet been ratified by twenty-two (or 40 percent) AU member states.[271] Article 5(3) of the African Court Protocol defines which indi-

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264. *See id*. These withdrawals are likely to continue unless there are significant improvements in the governance architectures of those African countries where opportunistic political leaders continue to see access to the African Human Rights Court as a threat to their continued monopolization of power. *See id*.

265. *African Court Protocol*, *supra* note 70, art. 34(6).

266. *Id*. Article 5(3) states that: "The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol." *Id*. art. 5(3).

267. *Id*. Article 34(6) of the African Court Protocol states as follows:

> At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.

African Court Protocol, *supra* note 70, art. 34(6).

268. *See Africa: Regional Human Rights Bodies Struggle*, *supra* note 262.

269. *See id*.

270. *See African Charter on Human and Peoples' Rights: Status List*, AFR. UNION, https://au.int/en/treaties/african-charter-human-and-peoples-rights (last visited Jan. 13, 2023) [https://perma.cc/8S8J-CR82] (archived Jan. 13, 2023). Morocco withdrew from the OAU in 1984 after the OAU granted the Sahrawi Arab Democratic Republic (SADR) full membership. As a consequence of that withdrawal, Morocco did not participate in the founding of the African Union, which replaced and took over the activities of the OAU in 2001. Morocco returned to the pan-African organization in 2017 and, in doing so, effectively accepted to cohabit with the SADR in an international organization in which the SADR was a founding member. However, Morocco has not yet signed the Banjul Charter. *See generally* Miguel Hernando de Larramendi, *The Return of Morocco to the African Union*, IEMED MEDITERRANEAN YEARBOOK 2017, at 232 (2017), https://www.iemed.org/publication/the-return-of-morocco-to-the-african-union/ [https://perma.cc/72F2-BHPU] (archived Jan. 13, 2023).

271. *See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Status List*, AFR. UNION, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (last visited Jan. 13, 2023) [https://perma.cc/

viduals and groups can "institute cases directly before" the Court in accordance with Article 34(6).[272] In order for a civil society organization (e.g., a NGO) to participate in the activities of the African Commission, including making oral presentations or statements to or before it, as well as access the African Human Rights Court, it must obtain observer status before the African Commission.[273]

Of the states that have ratified the African Court Protocol, only ten (or 30 percent) have made an Article 34(6) declaration, effectively accepting the competence of the African Human Rights Court to directly receive cases from individual citizens and NGOs within these countries.[274] However, four countries have since withdrawn their Article 34(6) declarations, effectively nullifying the African Human Rights Court's competence to directly receive cases from individuals and NGOs from these countries.[275] This does not augur well for the Court's viability and sustainability as the continent's preeminent human rights institution and for the protection of human rights in the continent in general.

Before this Article examines various Article 34(6) withdrawals, it will briefly review a change that was effected through Rule 130 of the African Commission's 2020 Rules of Procedure and which is likely to have a significant impact on the ability of individuals and groups to access the Court through the African Commission.[276]

K2N5-BE2W] (archived Jan. 13, 2023) [hereinafter *Protocol to the African Charter: Status List*].

272. Article 5(3) of the African Court Protocol states as follows: "The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol." *African Court Protocol*, *supra* note 70, art. 5(3).

273. *See African Commission Bows to Political Pressure, Withdraws NGO's Observer Status*, INT'L JUST. RES. CTR. (Aug. 28, 2018), https://ijrcenter.org/2018/08/28/achpr-strips-the-coalition-of-african-lesbians-of-its-observer-status/ [https://perma.cc/8SYJ-ZCET] (archived Jan. 13, 2023). In order for an NGO to access the African Human Rights Court, it must have obtained observer status before the African Commission. An NGO that has observer status before the African Commission can access the Court directly in accordance with Article 34(6) of the African Court Protocol. *See African Court Protocol*, *supra* note 70, art. 5(3).

274. These States are: (1) Benin (2016); (2) Burkina Faso (1998); (3) Côte d'Ivoire (2013); (4) The Gambia (2011); (5) Ghana (2011); (6) Malawi (2008); (7) Mali (2010); (8) Rwanda (2013); (9) Tanzania (2010); and (10) Tunisia (2017). *See Protocol to the African Charter: Status List*, *supra* note 271.

275. The States that have withdrawn their Article 34(6) declarations are: (1) Benin (2020); (2) Côte d'Ivoire (2020); (3) Rwanda (2016); and (4) Tanzania (2019). *See id.*

276. AFR. COMM'N, RULES OF PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS OF 2020, Rule 130 (2020), https://www.achpr.org/legalinstruments/detail?id=72 (last visited Jan. 13, 2022) [https://perma.cc/FJ5B-YP73] (archived Jan. 13, 2022) [hereinafter 2020 RULES OF PROCEDURE].

B. *The Impact of the New Rule 130 on the African Commission's Referral System*

Article 5(1)(a) of the African Court Protocol grants the African Commission the right to submit cases to the Court.[277] Under the African Commission's 2010 Rules of Procedure, the Commission may refer communications to the African Human Rights Court in four different scenarios: (i) when a respondent state "has not complied or is unwilling to comply with" a decision of the African Commission,[278] (ii) when a respondent state has failed to comply with provisional measures issued by the African Commission,[279] (iii) when a communication to the African Commission reveals "serious or massive violations of human rights,"[280] and (iv) "at any stage of the examination of a communication if [the Commission] deems [it] necessary."[281]

However, when the African Commission introduced its 2020 Rules of Procedure, Rule 118 was replaced by Rule 130, which has omitted all the scenarios presented in Rule 118 of the 2010 Rules of Procedure.[282] The only scenario left is one that says that the African Commission may refer cases to the African Human Rights Court when it has not yet determined the admissibility of a communication.[283] At this point, it is unclear "under what specific circumstances" the African Commission would make a referral to the Court.[284] The 2020 rules have also introduced new hurdles to access to the Court through the referral system that did not exist before. For example, under the new rules, referrals can only be made in respect of states that have ratified the African Court Protocol.[285] As of this writing, that means that refer-

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277. *African Court Protocol*, *supra* note 70, art. 5(1)(a).

278. AFR. COMM'N, 2010 RULES OF PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, Rule 118(1) (2010), https://www.achpr.org/public/Document/file/English/Rules_of_Procedure_of_the_African_Commission_on_Human_and_PeoplesRightsof2010_%20Legal%20Instruments%20_%20ACHPR.pdf (last visited Jan. 13, 2022) [https://perma.cc/932J-5PAE] (archived Jan. 13, 2022) [hereinafter 2010 RULES OF PROCEDURE].

279. *Id.* Rule 118(2). Under Article 5 of the African Court Protocol, the African Commission is one of five enumerated entities that "are entitled to submit cases to the Court." *African Court Protocol*, *supra* note 70, art. 5(1). Under the 2010 Rules of Procedure, the African Commission may refer communications to the African Human Rights Court in four different scenarios: (i) when a respondent State "has not complied or is unwilling to comply with" a decision of the African Commission; (ii) when a respondent State has failed to comply with provisional measures issued by the African Commission; (iii) when a communication to the African Commission reveals "serious or massive violations of human rights;" and (iv) "at any stage of the examination of a communication if [the Commission] deems [it] necessary." 2010 RULES OF PROCEDURE, *supra* note 278, Rule 118(1)–(4).

280. 2010 RULES OF PROCEDURE, *supra* note 278, Rule 118(3).

281. *Id.* Rule 118(4).

282. *See* 2020 RULES OF PROCEDURE, *supra* note 276, Rule 130.

283. *See id.* Rule 130(1).

284. AMNESTY INT'L, STATE AFRICAN REGIONAL HUMAN RIGHTS BODIES, *supra* note 261, at 20.

285. *See* 2020 RULES OF PROCEDURE, *supra* note 276, Rule 130(1).

rals to the Court cannot be made by the African Commission in respect of twenty-two (40 percent) member states of the African Union.[286] In addition, the African Commission must also secure the complainant's consent before it can make any referral to the Court.[287]

The change in rules introduced by the 2020 Rules of Procedure represents a major obstacle to the effective functioning of the referral system as a mechanism to improve the protection of human rights in Africa. However, this is also a reflection of "a growing and persistent reluctance by the African Commission to refer cases to the African [Human Rights] Court."[288] AI noted in its 2020 study that "[a]lthough the Court has been operational for more than 15 years, the African Commission has referred a paltry three cases to the African [Human Rights] Court."[289]

In addition to the fact that as many as 40 percent of AU member states have not yet ratified the African Court Protocol, effectively depriving their citizens access to the Court, the recent withdrawals of Article 34(6) declarations have further exacerbated the access problem. Hence, the African Commission is still the most realistic avenue for accessing the African Human Rights Court for most victims of human rights violations in the continent.[290] That significantly elevates the referral system and the relationship between the African Commission and the African Human Rights Court. Unfortunately, the introduction of the African Commission's new 2020 Rules of Procedure has rendered the referral system completely dysfunctional.[291]

While "Article 5(1) of the African Court Protocol is at the heart of the complementarity relationship that the African Commission enjoys with the African [Human Rights] Court, the provision [in Article 5(1)] may be rendered redundant if it is invoked only sparingly as the case has been or not at all."[292] Unless the African Commission reverses course and restores the scenarios presented in Article 118 of the 2010 Rules of Procedure, the effectiveness of both the African Commission

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286. *Protocol to the African Charter: Status List*, *supra* note 271 (listing the Member States of the AU that have not yet ratified the African Court Protocol).

287. *See* 2020 RULES OF PROCEDURE, *supra* note 276, Rule 130(2).

288. AMNESTY INT'L, STATE AFRICAN REGIONAL HUMAN RIGHTS BODIES, *supra* note 261, at 20.

289. *Id.*

290. *See id.*

291. Compare, for example, Article 118 of the 2010 Rules to Article 130 of the 2020 Rules. The latter effectively eliminates the four scenarios under which the African Commission could make referrals to the African Human Rights Court. These are replaced by a single ambiguous procedure that is likely render referrals practically impossible. *Compare* 2020 RULES OF PROCEDURE, *supra* note 276, Rule 130 (setting out the new procedures for referrals), *with* 2010 RULES OF PROCEDURE, *supra* note 278, Rule 118 (listing four scenarios under which the African Commission may refer cases to the African Human Rights Court).

292. AMNESTY INT'L, STATE AFRICAN REGIONAL HUMAN RIGHTS BODIES, *supra* note 261, at 20.

and the African Human Rights Court in protecting human rights will continue to deteriorate.

In what appeared to be simultaneous reactions to judgments rendered by the African Human Rights Court, three countries—Benin, Côte d'Ivoire, and Tanzania—unilaterally withdrew their Article 34(6) declarations, effectively depriving their citizens and NGOs located within their territories of direct access to the African Human Rights Court.[293] In the subparts that follow, this Article will examine these withdrawals, beginning with Tanzania's.

C. *Tanzania's Decision to Withdraw Its Article 34(6) Declaration*

Tanzania officially notified the African Union Commission (AUC) of its intention to withdraw its Article 34(6) declaration on November 21, 2019,[294] claiming, but not providing any evidence, that the Court had implemented the declaration "contrary to the *reservations* submitted by [Tanzania] when making its Declaration."[295]

The reservations that the government of Tanzania mentioned in its Notice of Withdrawal refer to the requirement that both NGOs and individuals should only be able to directly access the Court after they had exhausted "all domestic legal remedies" and "in adherence to the Constitution of [Tanzania]."[296] However, in all the cases against Tanzania that have been adjudicated by the Court, the Court has made

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293. *See Withdrawal of States from African Court*, *supra* note 83.

294. Tanzania had made its Article 34(6) declaration on March 9, 2010. Luke Anami, *Tanzania in the Spotlight for 'Withdrawal' from Arusha-Based Human-Rights Court*, THE E. AFR. (Nov. 6, 2021), https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-withdrawal-from-arusha-based-human-rights-court-3609834 [https://perma.cc/R9QX-EBSU] (archived Jan. 13, 2023).

295. *Notice of Withdrawal of the Declaration Made Under Article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights*, AFR. CT. ON HUM. & PEOPLES' RTS. (Nov. 26, 2019), https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf [https://perma.cc/HTZ4-V28V] (archived Jan. 13, 2023) (emphasis added). The declaration states as follows:

> Pursuant to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as 'the Court'), the United Republic of Tanzania do hereby declare that:
>
> 'The Court may entitle Non-Governmental Organizations (NGOs) with observer status before the [African] Commission and individuals to institute cases directly before it in accordance with Article 34(6) of the aforementioned Protocol. However, without prejudice to Article 5(3) of the aforesaid Protocol, *such entitlement should only be granted to such NGOs and individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania*."

Declarations: Tanzania, AFR. CT. ON HUM. & PEOPLES' RTS. (Mar. 9, 2010), https://www.african-court.org/wpafc/declarations/ [https://perma.cc/82HT-38HT] (archived Jan. 13, 2023) (emphasis added to indicate Tanzania's reservation).

296. *Declarations: Tanzania*, *supra* note 295.

sure that all admissibility requirements were met and in several instances, the Court has declared cases against Tanzania inadmissible "on account of non-exhaustion of local remedies."[297] For example, in *Anudo v. Tanzania*, the respondent state (Tanzania) raised the issue of admissibility based on "non-exhaustion of local remedies" grounds.[298] The Court carried out an exhaustive admissibility analysis, considered all the submissions on this issue, and dismissed the Respondent state's objection "to the admissibility of the Application on grounds of failure to exhaust local remedies."[299]

In 2019, when Tanzania announced its decision to withdraw its Article 34(6) declaration, the country was facing a rapidly deteriorating domestic human rights situation and a significant increase in hostilities against the country's human rights defenders.[300] Since November 2015, for example, the government of Tanzania has repressed virtually all forms of dissent "through the enforcement of a raft of draconian laws and the misuse of the criminal justice system to target and harass government critics."[301] In addition, "[a] ferocious and sustained crackdown on civil society, media, opposition politicians, researchers, bloggers and [human rights defenders] has had a chilling effect on the rights to freedom of expression, association and peaceful assembly."[302]

It appears that Tanzania's decision to render the African Human Rights Court incapable of directly receiving communications from citizens and NGOs within its territory may not have been due to any misuse of the admissibility requirements by the Court. A more plausible explanation for the decision by the government of Tanzania to withdraw the country's Article 34(6) declaration may have been to escape accountability for its deteriorating domestic human rights situation.[303]

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297. AMNESTY INT'L, STATE AFRICAN REGIONAL HUMAN RIGHTS BODIES, *supra* note 261, at 41.

298. Anudo v. United Republic of Tanzania, No. 012/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 42–53 (Mar. 22, 2018), https://www.african-court.org/en/images/Cases/Judgment/-012%20-%202015%20-%20Anudo%20Vs.%20Tanzania%20-%20Judgment%2022%20March%202018%20-%20Optimized.pdf [https://perma.cc/UW7G-7YUT] (archived Jan. 13, 2022) [hereinafter *Anudo v. Tanzania*].

299. *Id.* ¶ 53. Amnesty International has argued that Tanzania's "true intention in withdrawing" its Article 34(6) declaration was "to evade accountability by cutting off any further flow of cases against it at the African [Human Rights] Court." AMNESTY INT'L, STATE AFRICAN REGIONAL HUMAN RIGHTS BODIES, *supra* note 261, at 41. In addition, Amnesty International noted that the majority of judgments that the African Human Rights Court has issued so far have been against Tanzania and most of these cases involve or relate to "the right to fair trial" and point generally to "a systemic breakdown of the country's criminal justice system." AMNESTY INT'L, STATE AFRICAN REGIONAL HUMAN RIGHTS BODIES, *supra* note 261, at 41.

300. *See id.*

301. *Id.* at 41–42.

302. *Id.* at 42.

303. *See id.* at 41.

D. *The Republic of Benin and Its Article 34(6) Declaration*

In a letter dated April 21, 2020, Benin informed the AUC that it had decided to withdraw its Article 34(6) declaration and hence terminate the African Human Rights Court's competence to receive cases directly from Beninese citizens and NGOs under Article 5(3) of the African Court Protocol.[304] According to Samira Daoud, AI's Regional Director for West and Central Africa, Benin's decision "will block individuals and NGOs from directly accessing the African Court [and] demonstrates a real deterioration in the Benin government's protection of human rights."[305]

Unlike Tanzania, Benin provided "numerous justifications for its withdrawal decision," although the "precise timeline of events and cases instigating the withdrawal remain somewhat ambiguous."[306] Benin actually submitted its Article 34(6) withdrawal in March 2020, "but this only came to light in late April 2020."[307] In publicly announcing its withdrawal decision, Benin accused the African Human Rights Court of "dysfunctions and slippages" and pointed to what it considered was "interfere[nce] in issues related to state sovereignty and issues that do not fall within [the Court's] jurisdiction."[308]

Beninese authorities also argued that the Court's past decisions had been pervaded with "serious incongruities" and that these had forced its host, Tanzania, as well as Rwanda, to withdraw their Article 34(6) declarations.[309] Benin made references to two specific but "very different sets of cases, which, despite being provisional measures rather than judgements on the merits, elicited a severe reaction from Benin."[310] As part of its resistance to the Court, Benin "singled out cases involving the repayment of a large loan to the Société Générale Bénin . . . , saying the Court had been 'radically incompetent,' overstepped its authority, caused 'disarray in the business community,' and 'bec[a]me a source of real legal and judicial insecurity.'"[311]

The second issue in Benin's general resentment of the Court concerned a case brought by Sébastien Germain Ajavon, exiled former

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304. *See Benin: Withdrawal of Individuals Right to Refer Cases to the African Court a Dangerous Setback in the Protection of Human Rights*, AMNESTY INT'L (Apr. 24, 2020), https://www.amnesty.org/en/latest/news/2020/04/benin-le-retrait-aux-individus-du-droit-de-saisir-la-cour-africaine-est-un-recul-dangereux/ [https://perma.cc/6C9Q-CCWP] (archived Jan. 13, 2023).

305. *Id.*

306. Nicole de Silva & Misha Plagis, *A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court*, OPINIO JURIS (May 19, 2020), http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/ [https://perma.cc/2DQ5-HTGD] (archived Jan. 13, 2023).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

presidential candidate and a member of the political opposition.[312] Ajavon had been sentenced in absentia to twenty years in prison in connection with "a haul of 18 kg (40 pounds) of cocaine found in a shipping container in 2016."[313] Since Ajavon was outside Benin, the Beninese court issued an international arrest warrant against him.[314] Ajavon's lawyers appealed to the African Human Rights Court. In March 2019, the Court ordered Benin "to quash Ajavon's conviction and to pay compensation of approximately 40 billion CFA francs (around $66 million USD) to him."[315]

In his application to the African Human Rights Court, Ajavon had also complained that his "right to equal protection of the law guaranteed by Articles 3(2) of the [Banjul] Charter and 12 of the 1789 Declaration of the Rights of Man and of the Citizen" had been violated.[316] The African Human Rights Court had ruled in favor of Ajavon and had ordered Benin "to suspend [the] elections, until such time as the court could examine Ajavon's deposition."[317] Beninese officials argued that the Article 34(6) withdrawal was necessary "in order not to jeopardize the interests of an entire nation and the duty of a government which is responsible for holding elections on time."[318]

Like Tanzania's, Benin's withdrawal appeared to have been politically motivated and informed more by increasing domestic repression, dating back to the election of Patrice Talon as president in April 2016,

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312. Sébastien Germain Marie Ajavon Aîkoué v. Republic of Benin, No. 013/2017, Application, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (March 29, 2019) [hereinafter Ajavon v. Benin].

313. *Benin Businessman Sentenced in Absentia to 20 Years for Drug Trafficking*, REUTERS (Oct. 18, 2018), https://www.reuters.com/article/uk-benin-politics-drugs/benin-businessman-sentenced-in-absentia-to-20-years-for-drug-trafficking-idUKKCN1MS39S?edition-redirect=uk [https://perma.cc/DZS3-4K35] (archived Jan. 13, 2023); *see also* Ajavon v. Benin, *supra* note 312, ¶ 1.

314. *See* Abdoulaye Bah & Adam Long, *Benin's Partial Withdrawal from African Charter of Human Rights Is a Retreat from Democracy*, GLOB. VOICES (May 7, 2020), https://globalvoices.org/2020/05/07/benins-partial-withdrawal-from-african-charter-of-human-rights-is-a-retreat-from-democracy/ [https://perma.cc/UQ8T-6YKX] (archived Jan. 13, 2023); *see also* Ajavon v. Benin, *supra* note 312, ¶ 8.

315. *Id.* (noting that Benin had been ordered by the African Human Rights Court to pay 60 million euros to Ajavon). The amount of money that the African Human Rights Court ordered the Government of Benin to pay Ajavon was quite substantial. This was based on the Court's holding that Beninese authorities had deprived Ajavon of property, including the suspension of his "brokerage, transit and consignment company," as well as the cutting of the signals of his Soleil FM radio station and those of his SIKKA TV television channel, of which he was the majority shareholder. *See* The Matter of Sébastien Germain Ajavon v. Republic of Benin, No. 013/2017, Judgment (Reparation), African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 6, 144 (Nov. 28, 2019).

316. Ajavon v. Benin, *supra* note 312, ¶ 9.

317. Bah & Long, *supra* note 314.

318. de Silva & Plagis, *supra* note 306.

than to any real misuse of the African Human Rights Court's competence under Article 5(3) of the African Court Protocol.[319]

E. *Côte d'Ivoire's Withdrawal of Its Article 34(6) Declaration*

Côte d'Ivoire informed the AUC of its decision to withdraw its Article 34(6) declaration by letter dated April 28, 2020.[320] In the communiqué, the Ivorian government argued that "the Court's 'serious and intolerable' actions not only undermine its sovereignty, but are also 'likely to cause a serious disturbance of the internal legal order of State' and 'undermine the foundations of the rule of law by establishing genuine legal uncertainty.'"[321]

Like Tanzania's and Benin's Article 34(6) withdrawals, Côte d'Ivoire's withdrawal was related to a case that had been decided by the African Human Rights Court. In the case *Soro & Others v. Côte d'Ivoire*, the Court had ordered Côte d'Ivoire "to suspend an arrest warrant against Guillaume Soro, a former rebel leader, former prime minister, and presidential hopeful."[322] Soro had been convicted on April 28, 2020, in absentia "of embezzlement and money laundering

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319. *See* Tyson Roberts, *Benin Continues to Slide Toward Autocracy*, WASH. POST (May 7, 2021), https://www.washingtonpost.com/politics/2021/05/07/benin-continues-slide-towards-autocracy/ [https://perma.cc/W985-THGP] (archived Jan. 13, 2023) (noting the continued deterioration of Benin's democratic institutions under the presidency of Patrice Talon).

320. *See Declarations: Côte d'Ivorie*, AFR. CT. ON HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/declarations/ (last visited Jan. 13, 2023) [https://perma.cc/D2VE-P77B] (archived Jan. 13, 2023).

321. de Silva & Plagis, *supra* note 306.

322. *Id.* The Court had made this ruling on the basis that Côte d'Ivoire's decision was "unfairly prejudicial to Soro's political rights as a candidate in the election." *Côte d'Ivoire: Former Prime Minister Sentenced to 20 Years in Prison for Corruption*, U.S. LIBR. OF CONG. (May 15, 2020), https://www.loc.gov/item/global-legal-monitor/2020-05-15/cte-divoire-former-prime-minister-sentenced-to-20-years-in-prison-for-corruption [https://perma.cc/LDE8-3E57] (archived Jan. 13, 2023). Specifically, the Court held as follows:

> The Court further notes that in the instant case, the execution of the arrest or detention warrant against political personalities amongst whom is one who has already declared his intention to stand for elections and the fact that the elections are just a few months away, could seriously compromise the freedom and political rights of the Applicants.

In re Guillaume Kigbafori Soro & Others v. Republic of Côte d'Ivoire, No. 012/2020, Order for Provisional Measures, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 35 (Apr. 22, 2020). A spokesman for the Government of Côte d'Ivoire, Sidi Tiemoko Touré, said at the time that the country had made the decision to withdraw its Article 34(6) declaration because the African Human Rights Court "had undermined the authority, sovereignty and the Ivorian justice system." Felix Nkambeh Tih, *Ivory Coast Withdraws from African Human Rights Court: West African Nation Says Court Has Undermined Its Sovereignty*, ANADOLU AGENCY (Apr. 30, 2020), https://www.aa.com.tr/en/africa/ivory-coast-withdraws-from-african-human-rights-court/1824474 [https://perma.cc/95DK-3BDL] (archived Jan. 13, 2023).

and sentenced to 20 years in prison by an Ivorian court."[323] On April 29, 2020, one day after the conviction of Soro, Côte d'Ivoire announced that it was withdrawing its Article 34(6) declaration.[324]

In deciding to withdraw its Article 34(6) declaration, Côte d'Ivoire argued that the African Human Rights Court had taken "a political decision insofar as it confers a certain criminal immunity on someone who wants to be a candidate in the upcoming presidential election."[325] Ally Coulibaly, Minister of African Integration and Ivorians Abroad stated that this action by the Court was "unacceptable" and added further as follows: "We can't allow our jurisdictions to be weakened by adhering to the declaration of jurisdiction provided for in the protocol. We can't allow the foundations of the rule of law to be undermined."[326]

While the Ivorian government argued that the Court's action with respect to the *Soro* case interfered with the country's sovereignty, many human rights defenders saw the withdrawal as a major blow to the human rights protection architecture in the country. The withdrawal effectively deprives citizens of Côte d'Ivoire and its NGOs of the ability to directly seek relief in the African Human Rights Court when their rights are violated and they are unable to secure justice from domestic courts.[327] In addition, the withdrawal also sets a precedent that is likely to be followed by other countries that do not like the African Human Rights Court's rulings and who have historically emphasized sovereignty at the expense of recognizing and protecting human rights.[328] This decision, like that by the governments of Benin and Tanzania, represents "a step backwards for human rights" in Côte d'Ivoire and, indeed, the rest of the continent.[329]

F. Ingabire v. Republic of Rwanda *and Legal Implications of Rwanda's Article 34(6) Withdrawal*

Rwanda's decision to withdraw its Article 34(6) declaration was, like that of the other three member states of the AU, motivated by its reaction to a case before the African Human Rights Court.[330] Rwanda made its decision at a time when the Court was "set to decide a claim against [it] by a leading opposition politician, Victoire Ingabire, who [alleged that] her imprisonment for genocide denial was unfair and

323. de Silva & Plagis, *supra* note 306.

324. *See id.*

325. Jeune Afrique, *Côte d'Ivoire Pulls Out of the African Court on Human and Peoples' Rights Protocol*, AFR. REP. (May 4, 2020), https://www.theafricareport.com/27305/cote-divoire-pulls-out-of-the-african-court-on-human-and-peoples-rights-protocol/ [https://perma.cc/39HL-YCS6] (archived Jan. 13, 2023).

326. *Id.*

327. *See id.*

328. *See id.*

329. *See id.*

330. *See* de Silva & Plagis, *supra* note 306.

politically motivated."[331] Rwanda argued that its decision to withdraw was "intended to prevent exploitation of the individual complaint procedure by criminals, particularly individuals who took part in the 1994 genocide and have subsequently fled the country."[332]

The Rwandan government argued further that while the country's acceptance of the Court's "expanded jurisdiction was initially intended to allow for the resolution of human rights disputes between individuals or groups of individuals and the State, it was exploited by genocide fugitives with the intent of gaining 'a platform for re-invention and sanitization' of the genocide."[333] The country's Minister of Justice, Johnston Busingye, stated that "the timing of the withdrawal in relation to the case of Victoire Ingabire was a coincidence."[334]

After Ms. Ingabire spoke publicly about reconciliation and ethnic violence, she was subsequently arrested by Rwandan authorities and accused of grossly minimizing the genocide and undermining the authority of the state. She was convicted and sentenced to eight years in prison.[335] She appealed the conviction to the Supreme Court. However, the Supreme Court denied her appeal, found her guilty of various crimes (including terrorism and downplaying genocide), and resentenced her to fifteen years.[336]

Believing that she had exhausted all domestic remedies, Ms. Ingabire, on October 3, 2014, took her case to the African Human Rights Court, "alleging violations of her rights to a fair hearing, freedom of expression, and equal protection under three human rights treaties: the [Universal Declaration of Human Rights], the [Banjul Charter], and the [ICCPR]."[337] She prayed the Court to order Rwanda to repeal retroactively the specific laws under which she was convicted, annul

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331. *Rwanda Withdraws Access to African Court for Individuals and NGOs*, INT'L JUST. RES. CTR. (Mar. 14, 2016), https://ijrcenter.org/2016/03/14/414wanda-withdraws-access-to-african-court-for-individuals-and-ngos/ [https://perma.cc/T8MS-B8GK] (archived Dec. 30, 2022) [hereinafter *Rwanda Withdraws Access to African Court*].

332. *Id.*

333. *Id.*

334. *Id. See generally* Yakaré-Oulé (Nani) Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws*, 12 NW. J. INT'L HUM. RTS. 191 (2014) (examining the impact of Rwanda's laws against genocide denial and the right to freedom of expression).

335. *See* Oliver Windridge, *Assessing Rwexit: The Impact and Implications of Rwanda's Withdrawal of Its Article 34(6)-Declaration Before the African Court on Human and Peoples' Rights*, 2 AFR. HUM. RTS. Y.B. 243, 248 (2018).

336. *See Rwanda Withdraws Access to African Court*, *supra* note 331; *see also* Windridge, *supra* note 335, at 247–48 (describing Ingabire's case).

337. *Rwanda Withdraws Access to African Court*, *supra* note 331; *see also* Windridge, *supra* note 335, at 248. It is important to note that Rwanda signed the African Court Protocol on June 9, 1998, ratified it on May 5, 2003, and deposited the instrument on May 6, 2003. *See Protocol to the African Charter: Status List*, *supra* note 271. With respect to the Article 34(6) declaration, Rwanda made its declaration on January 22, 2013. *See Declarations: Rwanda*, AFR. CT. ON HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/declarations/ (last visited Jan. 13, 2023) [https://perma.cc/CH9T-58WB] (archived Jan. 13, 2023).

all previous decisions against her, and release her on parole.[338] The government of Rwanda argued, however, that Ms. Ingabire had not exhausted all domestic remedies and that, during her trial and conviction, all her rights had been respected.[339]

During the early stages of the litigation, Rwanda was fully participating in the proceedings and, hence, was quite knowledgeable about both the content of the application and the applicant. This level of engagement, argues international legal scholar Oliver Windridge, indicates that "Rwanda considered the African [Human Rights] Court a legitimate organ, even if it argued that the case itself was inadmissible and unfounded."[340]

With the filing complete, the Court notified all the parties by letter dated January 4, 2016, that it had scheduled a public hearing on the case for March 4, 2016.[341] In the run up to the public hearing and in letters dated February 29, 2016, and March 1, 2016, the applicant's legal team petitioned the Court for "an adjournment of the public hearing."[342] In the March 1, 2016 letter, the applicant also "requested to be heard on procedural matters."[343] However, on February 29, 2016, just four days before the public hearing was to be held, Rwanda "notified the African Union Commission of its intention to withdraw [its Article 34(6)] Declaration."[344] And in a letter dated March 3, 2016, the AUC notified the Court that it had received Rwanda's Article 34(6) withdrawal on February 29, 2016.[345]

In response to a request from the African Commission "to reconsider its decision to deny individuals and NGOs direct access to the Arusha-based continental court,"[346] Rwanda's AU ambassador, Hope Tumukunde, argued that Rwanda "had compelling reasons to pull out of the court protocol."[347] He stated further that "We quickly realised that [the African Human Rights Court] is being abused by the

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338. *See Rwanda Withdraws Access to African Court*, *supra* note 331.

339. *See id.*

340. Windridge, *supra* note 335, at 248–49.

341. *See* In re Umuhoza v. Rwanda, No. 003/2014, Ruling on Jurisdiction, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 15 (June 3, 2016) [hereinafter *In re Umuhoza v. Rwanda: Jurisdiction*].

342. *Id.* ¶ 17.

343. *Id.*

344. In re Umuhoza v. Rwanda, No. 003/2014, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 2 (Nov. 24, 2017) [hereinafter *In re Umuhoza v. Rwanda: Judgment*].

345. *Id.* ¶ 42; *see also Declarations: Rwanda*, *supra* note 337 (presenting a copy of Rwanda's note verbal to the African Union Commission regarding the withdrawal of its 34(6) Article Declaration).

346. *Rwanda Rejects Calls to Endorse African Rights Court*, CITIZEN (Apr. 19, 2021), https://www.thecitizen.co.tz/tanzania/news/national/rwanda-rejects-calls-to-endorse-african-rights-court-2561186 [https://perma.cc/NAP3-D9PU] (archived Dec. 30, 2022).

347. *Id.*

judges on absence of a clear position of the [C]ourt vis-à-vis genocide convicts and fugitives, and that is why we withdrew."[348]

It was Rwanda's strategy to first inform the AUC about its decision to withdraw its Article 34(6) declaration before sending any notice to the Court. Thus, it was only after the February 29, 2016 *note verballe* to the AUC that Rwanda, on March 1, 2016, "notified the Court of its deposit of an instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol."[349] In its March 1, 2016 letter, Rwanda also "contended that after deposition of the [instrument of withdrawal], the Court should suspend hearings involving the Republic of Rwanda until review is made to the Declaration and the Court is notified in due course."[350]

It appears from Rwanda's correspondence with the AUC and the African Human Rights Court over the *Ingabire* case that "the declaration's extended jurisdiction was being used by Rwandans alleged to have been involved in genocide minimisation or denial, something the Rwandan government could not accept."[351] One could argue that the Rwandan government was of the opinion that "access to the African [Human Rights] Court was open to Rwandans, just not *all* Rwandans."[352] This, of course, is a problematic approach to take towards a court that is supposed to protect the human rights of all Africans—there is no provision in the Court's founding document that says that individuals suspected of participating in the Rwandan Genocide or any other atrocities are excluded from seeking the services of the Court. In fact, the Banjul Charter is clear on who should enjoy the rights guaranteed by the Charter.[353]

It is clear that the Banjul Charter's protections extend even to those individuals accused of various human rights violations, including genocide. This is true of other international human rights instruments, such as the ICCPR, which guarantees the right to a fair trial and freedom of expression for *everyone*.[354] The ICCPR also guarantees the right to freedom of expression for everyone.[355]

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348. *Id.*

349. *See In re Umuhoza v. Rwanda: Judgment*, *supra* note 344, ¶¶ 41–42.

350. *Id.*

351. Windridge, *supra* note 335, at 250.

352. *Id.*

353. The Banjul Charter is clear on who should enjoy the rights guaranteed by the Charter: "*Every individual* shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter *without distinction of any kind* such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." *Banjul Charter*, *supra* note 31, art. 2 (emphases added).

354. According to Article 14(1) of the ICCPR, "[a]ll persons shall be equal before the courts and tribunals" and "*everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*." International Covenant on Civil and Political Rights art. 14(1), Dec. 19, 1966, 999 U.N.T.S. 171 (emphasis added) [hereinafter ICCPR].

355. *See id.* art. 19.

Thus, while the exercise of these rights may be "subject to certain restrictions," the latter must only be those provided by law. It is for this reason that Rwanda's decision to withdraw its Article 34(6) declaration, and hence deny direct access to the Court for its citizens, is problematic. Genocide is a horrendous and insidious crime. However, for the rule of law to function, even those accused of committing genocide must be granted their day in court. An individual accused of committing the crime of genocide is not a *génocidaire* until he or she is convicted by a duly constituted court or tribunal.

Despite Rwanda's efforts, the Court was able to hold its public hearing on March 4, 2016, as scheduled.[356] Apparently, the Court was able to resist efforts from Rwandan authorities to postpone the hearing until the country's withdrawal had been fully considered. On March 18, 2016, the Court issued an interim order and gave all parties the opportunity to address the issue of Rwanda's withdrawal of its Article 34(6) declaration.[357]

In response to the Court's interim order, Rwanda averred "that by virtue of the principle of parallelism of forms, it is only the AUC that is empowered to decide on the withdrawal and its effects" and that "the Court and Parties to the Application have nothing to do with the decision regarding the withdrawal of its declaration once it was deposited with the AUC."[358] In its letter dated March 3, 2016, noted Rwanda, "it was only requesting to be heard by the Court on its request to suspend hearings and not on the question of the withdrawal."[359]

In response, Ingabire cited to the Vienna Convention on the Law of Treaties (Vienna Convention) and argued that "in the absence of provisions for withdrawal of the declaration pursuant to Article 34(6) of the [African Court] Protocol, Article 56 of the [Vienna Convention] . . . should be applied in the interpretation of the Protocol."[360] She argued further that "prohibiting States from withdrawing from a treaty or declaration that they made voluntarily may be too radical a position and would interfere with State sovereignty"; however, "this

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356. *See In re Umuhoza v. Rwanda: Jurisdiction*, *supra* note 341, ¶¶ 20–23.

357. In that order, the Court decided as follows:

> Orders that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol, within fifteen (15) days of receipt of this Order.
>
> Decides that its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Protocol shall be handed down at a date to be duly notified to the Parties.
>
> Orders the Applicant to file written submissions on the procedural matters stated in paragraph 15 above, within fifteen (15) days of receipt of this Order.

In re Umuhoza v. Rwanda, No. 003/2014, Interim Order, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 20–22 (Mar. 18, 2016).

358. *In re Umuhoza v. Rwanda: Jurisdiction*, *supra* note 341, ¶ 36.

359. *Id.*

360. *Id.* ¶ 38.

should not be viewed as allowing States to withdraw at any moment or in any manner."[361] Ingabire then urged the Court "to be guided by the principle of *pacta sund servanda*, which requires parties to a treaty to perform their duties in good faith"[362] and asserted that the principle of good faith "requires a reasonable time for withdrawal to serve as a cooling off period."[363]

Ingabire argued that "the goal of demanding advance notice of withdrawal is to discourage opportunistic defections that may cause treaty-based cooperation to unravel."[364] She also pointed to "the examples of the European Convention on Human Rights and the American Convention on Human Rights which provide for notice periods of six months and one year, respectively," and then urged the African Human Rights Court "to consider these comparative treaties and apply their principles by analogy."[365]

With regard to how Rwanda's withdrawal of its Article 34(6) declaration would affect her case, Ms. Ingabire argued that the withdrawal should have no effect on her case and other pending cases "based on the principle of non-retroactivity" and that "allowing [Rwanda] to withdraw from proceedings before the Court at this stage would offend the principle of legality."[366] She supported this position by citing to the Vienna Convention's Article 70(1)(b), which provides that unless otherwise agreed, the termination of a treaty does not affect preexisting obligations or legal situations.[367]

Finally, argued Ingabire, "complaints submitted [to the Court] after the withdrawal would still be admissible to the extent that they address State action during the period when the State was still bound by the convention."[368]

The Court then considered an amicus curiae brief submitted by the African Court Coalition, which focused on two issues.[369] The first issue concerned whether Rwanda was entitled to withdraw its declaration and what the legal effects of that withdrawal would be on proceedings

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361. *Id.*

362. *Id.* ¶ 38.

363. *Id.* ¶ 39. In the case *Nicaragua v. United States of America*, the International Court of Justice had held as follows:

> But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 63 (Nov. 26).

364. *In re Umuhoza v. Rwanda: Jurisdiction*, *supra* note 341, ¶ 41.

365. *Id.*

366. *Id.* ¶ 42.

367. *See id.*

368. *Id.*

369. *See id.* ¶¶ 29, 33, 43.

that were pending.[370] Where the protocol did not have express provisions governing withdrawals of declarations, argued the coalition, "the provisions of Article 56 of the Vienna Convention may apply."[371]

In addition, argued the coalition, "rules that govern treaties also apply to the acceptance of the jurisdiction of courts, and as such, the Court should interpret the Respondent's withdrawal in light of the provisions of the Vienna Convention."[372]

Rwanda's Article 34(6) declaration, argued the coalition, created "international obligations for the accepting State."[373] In addition, "in the event the Respondent reviews its declaration to include some reservations, pursuant to Article 19(c) of the Vienna Convention, they must not be incompatible with the object and purpose of the treaty."[374] The withdrawal was incompatible with the "spirit set out in the human rights legal instruments adopted by the African Union."[375]

Regarding what effects the respondent state's withdrawal would have on pending proceedings, including the *Ingabire* case, the coalition argued that Rwanda was "required to serve notice of its intention to withdraw [its Article 34(6) declaration] at least twelve months in advance in compliance with Article 56(2) of the Vienna Convention."[376] Finally, argued the coalition, the request by the respondent state that the Court should immediately suspend pending cases, including *Ingabire*, constituted a breach of the provisions of international law on treaties, the Banjul Charter, and the African Court Protocol and that it is the Court's role and duty "to preserve, complement and reinforce" all the progress that has been made in the protection of human rights by the continent's human rights bodies and mechanisms.[377] This, the coalition noted, "specifically includes ensuring compliance with the criteria on the equality of parties to a trial, regardless of whether or not a Party is a sovereign State" and that "the Court should aim at ensuring observance of the right of any victim to seek effective legal remedy in conformity with Article 7 of the Charter and the '*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*' adopted by the Commission."[378]

The Court addressed three main issues: whether Rwanda's withdrawal was valid; if it was, what were the appropriate conditions for the withdrawal?; and what would be the legal effects of the withdrawal.[379] While Rwanda had argued that the AUC had jurisdiction to

370. *See id.* ¶ 43.
371. *Id.*
372. *Id.*
373. *Id.* ¶ 44.
374. *Id.*
375. *Id.* ¶ 45.
376. *Id.* ¶ 46.
377. *See id.* ¶ 47.
378. *Id.*
379. *See id.* ¶ 48.

decide issues of Article 34(6) withdrawals and not the Court, the Court relied on Article 3 (2) of the African Court Protocol to affirm that it is the Court that has the power to decide disputes regarding jurisdiction.[380] Therefore, regarding Rwanda's decision to withdraw its Article 34(6) declaration, the Court held that it had the jurisdiction to adjudicate the matter.[381]

Regarding whether Rwanda's withdrawal was valid, the Court acknowledged that the African Court Protocol did not have any provisions dealing with withdrawal from either the declaration in particular or the treaty in general.[382] With respect to the applicability of the Vienna Convention, the Court noted that "while the declaration pursuant to Article 34(6) emanates from the Protocol which is subject to the law of treaties, the declaration itself is a unilateral act that is not subject to the law of treaties."[383] The Court then held that the Vienna Convention did not apply to the Article 34(6) declaration.[384]

With respect to whether the Respondent State's withdrawal was valid, the Court noted that its decision would be guided by "relevant rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty."[385] The Court argued further that "[r]egarding the rules governing recognition of jurisdiction of international courts, . . . related declarations are generally optional in nature," as illustrated "by the provisions relating to the recognition of jurisdiction of the International Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights."[386] The Court noted that since it is unilateral, Rwanda's declaration is separable from the African Court Protocol and, hence, the withdrawal is independent of the Protocol.[387] "[T]he optional nature of the declaration and its unilateral character," noted the Court, "stem from the international law principle of state sovereignty."[388] In addition, under the principle of state sovereignty, states have the freedom and right to commit themselves to international agreements and they also retain the discretion to withdraw these commitments.[389] The Court then held that "the Respondent is entitled to withdraw its declaration pursuant to Article 34(6) and that such withdrawal is valid under the Protocol."[390]

With respect to the conditions of the withdrawal, the Court held that "even if withdrawal of the declaration under Article 34(6) is

380. *See id.* ¶ 36.
381. *See id.* ¶ 52.
382. *See id.* ¶ 53.
383. *Id.* ¶ 54.
384. *See id.*
385. *Id.* ¶ 55.
386. *Id.* ¶ 56.
387. *See id.* ¶ 57.
388. *Id.* ¶ 58–59.
389. *See id.* ¶ 58.
390. *Id.* ¶ 59.

unilateral, the discretionary character of the withdrawal is not absolute" and that this was especially true of "acts that create rights to the benefit of third parties, the enjoyment of which require legal certainty."[391] Instead, in such circumstances, notice is necessary, particularly because once Article 34(6) declarations are made, they are more than an international commitment by the state. More importantly, they "subject[] rights to the benefit of individuals and groups."[392]

According to the Court, providing a notice period "is essential to ensure juridical security by preventing abrupt suspension of rights which inevitably impact on third parties, in this case, individuals and groups who are rights-holders."[393] Such notice is very important because the African Court Protocol implements the Banjul Charter, which guarantees the protection of human rights contained in both the charter and other international human rights instruments.[394] Therefore, the sudden withdrawal of an Article 34(6) declaration without prior notice "has the potential to weaken the protection regime provided for in the [Banjul] Charter."[395]

With respect to how long such a notice period should be, the Court sought guidance from the Inter-American Court of Human Rights and the case *Bronstein v. Peru*, where the Inter-American Court of Human Rights held that on the basis of "legal certainty and stability," a formal notification of one year before withdrawal must be given.[396] Using *Bronstein* as a guide, the Court then held that "the provision of notice is compulsory in cases of withdrawal of the declaration under Article 34(6) of the Protocol" and that "a notice period of one year shall apply."[397]

Finally, regarding the legal effects of the respondent's withdrawal, the Court noted that the effects were twofold. First, "considering that a notice period of one year applies, the act of withdrawal will have effect only after the expiry of that period."[398] As a consequence, the Court held that "the withdrawal of the Respondent's declaration under Article 34(6) of the Protocol shall take effect after a period of one year, that is, from 1 March 2017."[399] Second, "an act of the Respondent cannot divest the Court of jurisdiction it had to hear the matter. This position is supported by the legal principle of non-retroactivity which stipulates that new rules apply only to future situations."[400] In

391. *Id.* ¶ 60.
392. *Id.* ¶ 61.
393. *Id.* ¶ 62.
394. *See id.*
395. *Id.*
396. *Id.* ¶ 63; *see also* Iver-Bronstein v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 29 (Feb. 6, 2001).
397. *In re Umuhoza v. Rwanda: Jurisdiction*, *supra* note 341, ¶¶ 63–66.
398. *Id.* ¶ 67.
399. *Id.*
400. *Id.* ¶ 68.

conclusion, the Court held that "the Respondent's notification of intention of withdrawal has no legal effect on cases pending before the Court."[401]

After delivering this judgment, the Court proceeded to examine *Ingabire* on the merits and eventually issued its ruling on November 24, 2017.[402] The Court held that the respondent state had violated Article 9(2) of the Banjul Charter, which states that "[e]very individual shall have the right to express and disseminate his opinions within the law,"[403] and Article 19 of the ICCPR, which guarantees various rights including the right to freedom of expression.[404] The Court's judgment in *Ingabire* is important, not just because its ruling on jurisdiction clarified issues surrounding the withdrawal of a declaration pursuant to Article 34(6) of the African Court Protocol, but also because its ruling on the merits produced an important precedent "on what can be considered legitimate restrictions on freedom of expression, developing the notions of restrictions proscribed by law, serving a legitimate purpose and whether they are necessary and proportional."[405]

In its activity report presented to the Executive Council of the AU in February 2021, the African Human Rights Court underscored "its success as a human rights court" and "that of the African human rights or justice system as a whole."[406] However, the Court sees the withdrawal of Article 34(6) declarations as a worrying trend. In the next subpart, this Article provides an overview of the Court's concerns.

G. *The African Human Rights Court's Concerns about Article 34(6) Withdrawals*

In 2021, the African Human Rights Court took notice of a worrying trend in which member states of the AU were withdrawing their Article 34(6) declarations. It argued that during a four-year period, four states parties to the African Court Protocol had withdrawn their declarations after the Court had rendered judgments against them.[407]

The Court is concerned that if this trend continues, it can undermine the continent's human rights protection bodies and mechanisms and effectively deprive millions of Africans "of a fundamental right

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401. *Id.*

402. *See In re Umuhoza v. Rwanda: Judgment*, *supra* note 344, ¶ 173.

403. *Id.* ¶ 130 (quoting *Banjul Charter*, *supra* note 31, art. 9(2)).

404. *See In re Umuhoza v. Rwanda: Judgment*, *supra* note 344, ¶ 173(ix); ICCPR, *supra* note 354, art. 19.

405. Windridge, *supra* note 335, at 257.

406. AFR. CT. ON HUM. & PEOPLES' RTS., ACTIVITY REPORT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS 1 JANUARY–31DECEMBER 2020, ¶ 38 (2021), https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2020/ (last visited Jan. 14, 2023) [https://perma.cc/PCU3-HV8T] (archived Jan. 14, 2023) [hereinafter AFR. CT. ON HUM. & PEOPLES' RTS., ACTIVITY REPORT].

407. *See id.* ¶ 39.

which they had acquired, that of accessing justice directly before the African Court."[408] Courts play a very important and integral part in maintaining the rule of law, whether it is in an African country or in the continent as a whole. However, courts derive their legitimacy from and rely primarily on, public support, trust, and confidence so that they can perform their roles in maintaining the rule of law. If the public does not accept the court's rulings, or loses confidence in the courts, courts cannot function effectively and would eventually lose their legitimacy. Hence, the decision by some African governments to refuse to accept the rulings of the African Human Rights Court is detrimental to the Court's continued viability and position as the premier human rights body in the continent.

Although the decisions of the African Human Rights Court are final and not subject to appeal, losing parties can apply for a review of the judgment if new evidence, which was "not within the knowledge of a party at the time the judgment was delivered," is uncovered.[409] African governments must work to strengthen and not destroy this important human rights institution, and they can do so by fully participating in its work and accepting its decisions and only using legal means to challenge them. If litigation before the African Human Rights Court lacks finality, or if some parties to the litigation refuse to accept the Court's judgments, the Court will lose its relevance to the protection of human rights in the continent, resulting in worse outcomes for citizens, especially vulnerable individuals and groups.

In its report, the Court also noted that it views the withdrawals of Article 34(6) declarations "as a decline in the efforts already made" in building democracies on the continent, defending human rights, and promoting the rule of law.[410] The report stated that the only AU judicial body that individuals can approach directly when their human rights are violated is the African Human Rights Court.[411] However, noted the report, "[t]his can only be possible where the State against which an allegation is filed has deposited the Declaration required under Article 34(6) of the Protocol."[412] As made clear by Article 34(6) of the African Court Protocol, the declaration represents "a mechanism to grant individuals and NGOs direct access to the Court to seek remedies if they are not satisfied with domestic remedies."[413] Failing to deposit the declaration or withdrawing one after it has been duly

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408. *Id.*

409. FAQs, AFR. CT. ON HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/faqs/#1587292110403-7041c152-def0 (last visited Jan. 5, 2023) [https://perma.cc/457T-2CW3] (archived Jan. 5, 2023).

410. AFR. CT. ON HUM. & PEOPLES' RTS., ACTIVITY REPORT, *supra* note 406, ¶ 40.

411. *See id.*

412. *Id.*

413. *Id.*

deposited "deprives citizens of the ability to seek effective remedies for alleged human rights violations."[414]

The trend towards Article 34(6) withdrawals "is contrary to and inconsistent with the commitment made by African leaders in the *Declaration by the Assembly on the Theme of the Year 2016*—the African Year of Human Rights with Particular Focus on the Rights of Women, adopted in Kigali, Rwanda during the 27th Assembly of Heads of State and Government."[415] In the declaration,

> the Heads of State 'reiterate[d] [their] unflinching determination to promote and protect human and peoples' rights and all basic freedoms in Africa and the need for the consolidation and the full implementation of human and peoples' rights instruments and relevant national laws and policies, as well as decisions and recommendations made by AU Organs with a human rights mandate.'[416]

H. *Funding and Budgetary Issues Afflicting the African Human Rights Court*

In addition to threats coming from the unwillingness of some AU member states to accept the African Human Rights Court's rulings, the Court also suffers from inadequate and insecure budgetary support. Although there has been some progress in the AU's ability to mobilize resources for its development initiatives, contributions from member states are "still negligible, with approximately 75% of financing coming from external partners, particularly the European Union (EU) and individual European states."[417] This dependence on external funding continues to threaten the ability of Africans to make decisions without the interference of the EU or individual European states.[418] Hence, it is important that all member states of the AU step up their support for the continental organization.

However, according to the AU Executive Council decisions made in February 2021, the AU approved a budget of $623,836,163 USD for fiscal year 2021.[419] Of that amount, $203.5 million (or 32 percent) was to be financed by contributions from member states, while $406,194,344 (or 65 percent) was to come from external sources, mainly

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414. *Id.*

415. *Id.* ¶ 41 (citing AFR. UNION, DECISIONS AND DECLARATIONS: ASSEMBLY OF THE UNION TWENTY-SEVENTH ORDINARY SESSION 17–18 JULY 2016 (2016), https://au.int/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf (last visited Jan. 14, 2023) [https://perma.cc/67TV-8KN2] (archived Jan. 14, 2023) (emphasis in original).

416. AFR. CT. ON HUM. & PEOPLES' RTS., ACTIVITY REPORT, *supra* note 406, ¶ 41 (quoting AFR. UNION, *supra* note 415, at 32).

417. *AU Financial Independence: Still a Long Way to Go*, ISS: PSC REPORT (Mar. 24, 2021), https://issafrica.org/pscreport/psc-insights/au-financial-independence-still-a-long-way-to-go [https://perma.cc/BA23-QC5M] (archived Jan. 5, 2023).

418. *See id.*

419. *See id.*

Africa's so-called development partners.[420] Although the fact that more than half of the AU's budget is financed by external actors has been identified as a troubling issue for more than two decades, available data show that less than 40 percent of member states "actually pay their contributions to the institution" and, "[a]s long as these shortfalls persist, the AU's financial independence will remain a pipe dream."[421]

In the AU's assessed budget for 2020, both the African Commission and the African Human Rights Court suffered reductions in their allocations. The African Commission's budget was reduced by 14 percent, while that of the African Human Rights Court declined by 5 percent.[422] However, the budget of the African Children's Committee increased by 121 percent.[423] In an address on the occasion of the Judicial Education and Training Program for Judges of the African Court of Human and Peoples' Rights at Arusha, Tanzania (March 5–7, 2014), the Right Honorable Sir Denis Byron, president of the Caribbean Court of Justice, declared that "[a] watershed moment in the modern human rights movement on the African continent was the development of the [Banjul Charter] as an integral instrument in the Constitutive Act of the African Union."[424]

After reiterating the African Human Rights Court's mission, Justice Byron then noted threats to the Court's sustainability, including the failure of AU member states to sign and ratify the African Court Protocol, as well as make declarations pursuant to Article 34(6) of the protocol.[425] He then argued that it was important for Africans to find ways to guarantee the sustainability of the African Human Rights Court's budget and its budgetary process.[426]

The honorable justice also noted that the operation of the African Human Rights Court is "unavoidably hampered by the fact that apart from the President[,] the Judges still work on a part time basis."[427] Additionally, there would likely be increased demands on the Court that "will emerge from the inevitable increase in workload as more member states sign on to the protocols."[428] All these additional pressures on the Court, argued Justice Byron, will "require robust financial

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420. *See id.*

421. *Id.*

422. *See* AMNESTY INT'L, STATE AFRICAN REGIONAL HUMAN RIGHTS BODIES, *supra* note 261, at 47.

423. *Id.*

424. DENNIS BYRON, CARIBBEAN CT. OF JUST., FUNDING FOR THE COURT: TRUST FUND BABIES – A NEW ERA IN COURT FINANCING 1–2 (2014), https://ccj.org/wp-content/uploads/2021/03/Remarks-at-the-Judicial-Education-and-Training-Programme-for-African-Judges-of-Human-and-Peoples-Rights-_Sir-Dennis-Byron_20140305.pdf (last visited Jan. 14, 2023) [https://perma.cc/VL8C-MQ8G] (archived Jan. 14, 2023).

425. *See id.* at 2–3.

426. *See id.* at 3.

427. *Id.*

428. *Id.*

support and there will be need for significant increases in budgetary demands."[429]

Of course, as the Court's human rights jurisprudence is deepened and becomes more entrenched in the decision architectures of domestic courts throughout the continent, there is likely to be a significant increase in the demand for the Court's services. This will come by way of more interest by individuals and NGOs to send communications to the Court. These additional demands on the Court will require additional financial resources.

Article 32 of the African Court Protocol provides that the Court's budget "shall be determined and borne" by the AU, in accordance with criteria laid down by the AU "in consultation with the Court."[430] Unfortunately, according to this approach, the Court must make annual applications to the AU and be subjected to the whims of politicians in the capitals of member states.[431] As a consequence, the Court's budget can be held hostage, not just to political changes in member states, but also to the way member states respond to the Court's rulings. Hence, a way must be found to reduce the Court's dependence on politicians who see the Court as a threat to their hegemony. Most importantly, the Court's budget and budgetary process must be made more predictable and sustainable.

Like any judicial body, the African Human Rights Court must be granted significant levels of independence so that it can perform its functions without interference from any member state or fear of retribution by states that do not accept its rulings. The independence of a tribunal or judiciary is "foundational to and indispensable for the discharge of the judicial function."[432] Although judicial independence is a complex and multidimensional concept, at the minimum, a court must be "completely independent of any other entity" and that includes "other branches of government, social groups, and individuals."[433] In the case of the African Human Rights Court, the threat to its independence is likely to come from the AU Assembly, the supreme governing body of the AU.[434]

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429. *Id.*

430. *Id.* at 3–4 (citing *African Court Protocol*, *supra* note 70, art. 32).

431. *See* BYRON, *supra* note 424, at 4.

432. *De Lange v. Smuts* 1998 (7) BCLR 779 (CC) ¶ 59 (S. Afr.). Although this declaration was made by the South African Constitutional Court in respect of courts in Africa, there is no reason why it cannot be applied to the African Human Rights Court.

433. *Judicial Independence*, UNIV. OF ALTA. CTR. FOR CONST. STUD., https://ualawccstest.srv.ualberta.ca/2019/07/judicial-independence/ (last visited Jan. 6, 2023) [https://perma.cc/LC99-CRAC] (archived Jan. 6, 2023) (quoting Macklin v. New Brunswick, [2002] S.C.R. 13, ¶ 35 (Can.)).

434. The Assembly of the Union is composed of the Heads of State and Government of AU States. Although the Assembly is the supreme governing body of the African Union, it is gradually devolving some of its decision-making powers to the Pan-African Parliament. *See The Pan-African Parliament*, AFR. UNION, https://au.int/en/pap (last visited Jan. 6, 2022) [https://perma.cc/5TE2-QCCU] (archived Jan. 6, 2022).

In general, independence of the Court has two dimensions—individual and institutional. First, the Court's judges should be able to decide cases without any interference.[435] Second, the Court should be independent from other branches of the AU.[436] Judicial independence also implies "security of tenure, financial security, and administrative independence."[437] Unless all three of these elements are present, a judiciary cannot claim to be operating with an acceptable level of independence.[438]

The African Human Rights Court consists of eleven judges who are nationals of member states of the AU and are "elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights."[439] With respect to tenure, each judge is "elected for a period of six years and may be re-elected only once," which means that a judge can potentially serve for a maximum of twelve years.[440] Except for the fact that "[a]ll judges except the President [of the Court] . . . perform their functions on a part-time basis," and hence, are likely to seek outside employment to subsidize their income, security of tenure has not really been a problem for the Court.[441]

The African Court Protocol guarantees the Court's independence and grants judges diplomatic immunity—that is, the immunity extended to diplomats in accordance with international law.[442] This significantly strengthens the independence that the Court's judges need to perform their functions. Also, by granting judges immunity from the decisions or opinions that they issue in the exercise of their functions, the protocol ensures that parties that are not satisfied with the Court's rulings do not seek to hold judges personally liable for those decisions.[443] The protocol also protects against politically motivated dismissals. According to Article 19(1), "[a] judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court."[444]

The process for allocating financial resources to the Court, as defined in Article 32 of the African Court Protocol, leaves the Court and

435. *See Judicial Independence*, *supra* note 433.
436. *See id.* (citing Valente v. The Queen, [1985] 2 S.C.R. 673, ¶ 20 (Can.)).
437. *Judicial Independence*, *supra* note 433.
438. *See id.*
439. *African Court Protocol*, *supra* note 70, art. 11(1).
440. *Id.* art. 15(1).
441. *See id.* art. 15(4).
442. *See id.* art. 17(3).
443. *See id.* art. 17(4).
444. *Id.* art. 19(1).

its judges susceptible to manipulation by the AU Assembly.[445] Hence, to improve the financial security of the Court as an institution and its judges, the AU should seriously consider creating an independent trust to fund the Court and its activities. Such a funding model has already been tried by a supranational tribunal—the Caribbean Court of Justice (CCJ).[446]

Justice Byron has noted that when the CCJ was founded, there was "concern about the concept of the independence of the court and also about [its] sustainability."[447] However, "[a] financing model was found which guaranteed, independence from the political establishment, and financial stability and sustainability."[448] Member states of the Caribbean community, noted Justice Byron, signed a binding agreement with the force of an international treaty (to be interpreted in accordance with international law) that created a trust fund.[449] Member states of the Caribbean Community and Common Market agreed to invest a predetermined amount in the trust fund, with earnings from the trust being used to fund the CCJ. Justice Byron stated that "[t]here was a predetermined payment ratio based on the economic status of the states."[450]

The assessed amount for each state was paid by the Caribbean Development Bank based on an agreement that had been signed earlier between the member states and the bank—the member states had agreed to pay their respective shares as "a loan over a 10 year period."[451] According to Justice Byron, one of the advantages of this approach to funding the CCJ is that each member state only had to make a one-time contribution, with the earnings from the trust funding the Court in perpetuity.[452]

A similar scheme can be used to finance the African Human Rights Court. In addition to the fact that an African Human Rights Trust will improve financial security for the African Human Rights Court, it will also eliminate the onerous and often politically charged annual process of applying for funds. Perhaps, most importantly, a trust will require member states to make only a one-time payment to support the Court. As in the case of the CCJ, assessments for the African Human Rights Trust will be based on each country's economic capacity, with countries such as Nigeria, South Africa, Egypt, Algeria, Morocco, Kenya, Ethiopia, and Ghana expected to contribute more than their relatively

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445. According to Article 32 of the African Court Protocol, "emoluments and allowances for judges and the budget of its registry, shall be determined . . . by the [AU], in accordance with criteria laid down by the [AU] in consultation with the Court." *Id.* art. 32.

446. *See* BYRON, *supra* note 424, at 4.

447. *Id.*

448. *Id.*

449. *See id.* at 5.

450. *Id.*

451. *Id.*

452. *See id.*

less economically endowed neighbors. The initial endowment for the CCJ Trust was $100 million and this amount was shared among twelve member states, with Barbados (14 percent), Jamaica (29 percent), and Trinidad and Tobago (32 percent) contributing 75 percent of the funds.[453]

If the African Human Rights Trust were to be endowed initially at $500 million USD, one could suggest the following one-time assessments: Nigeria (10 percent); South Africa (10 percent); Egypt (10 percent); Algeria (8 percent); Morocco (8 percent); Kenya (6 percent); Ethiopia (5 percent); and Ghana (5 percent). Those assessments will amount to 62 percent or $310 million. The rest, $190 million, can then be sourced from the other forty-seven member states of the AU, with States such as South Sudan, Burundi, and the Sahrawi Arab Democratic Republic contributing the least. In fact, if assessments of between 3–4 percent are made from Angola (4 percent), Sudan (4 percent), Botswana (3 percent), Tunisia (3 percent), Gabon (2.5 percent), Mauritius (2.5 percent), Seychelles (2 percent), and Equatorial Guinea (1.5 percent) that will cover 22.5 percent of the total amount, leaving only 15.5 percent to be shared by the 39 remaining countries.[454]

These assessments, of course, are only suggestions. The decision to create the trust, its initial endowment, and how much each member state of the AU would have to initially invest in the trust, should be a policy decision that must be taken up by the AU Assembly. However, in order to ensure full and sustainable funding of the continent's human rights institutions, the AU must create such a trust or provide an alternative funding model that is sustainable and not subject to manipulation by AU member states.

VII. SUMMARY AND CONCLUSION

During most of the post-independence period in Africa, many governments have neglected the recognition and protection of human rights and relegated this important function to a small group of poorly funded but brave and "courageous" civil society activists.[455] At the same time, some governments have either actively participated in gross human rights violations or failed to bring to justice those who have committed atrocities against their fellow citizens. Consider, for example, the ongoing massacre of men, women, and children in the Western Darfur region of Sudan, believed by some analysts to be the

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453. *Id.* at 6–7.

454. These assessments are based on these countries' relatively high per capita incomes as provided by the UN Development Programme (UNDP). *See, e.g.*, UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), 2021/22 HUMAN DEVELOPMENT REPORT 296–98 (Sept. 8, 2022), https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22pdf_1.pdf (last visited Jan. 6, 2023) [https://perma.cc/YT26-GZ8L] (archived Jan. 6, 2023).

455. *See* Fleshman, *supra* note 25.

first genocide of the twenty-first century, which has resulted in the deaths of more than half a million people and displaced millions more.[456] There is credible evidence that the main perpetrators of these insidious acts against the people of Darfur include the government in Khartoum and various non-state actors, particularly the Janjaweed.[457]

However, many human rights organizations, as well as intergovernmental organizations, have emerged in the continent and have taken an active part in improving governance generally and the protection of human rights in particular. Despite the fact that several African governments remained hostile to the adoption of a regional approach to the protection of human rights, the OAU was still able to adopt the Banjul Charter in 1981, which today remains the continent's premier human rights instrument.[458]

Today, the African Commission, the African Committee of Experts on the Rights and Welfare of the Child, and the African Human Rights Court are the continent's main human rights institutions. The relationship between the African Human Rights Court and the African Commission is governed by the protocol establishing the Court, Rule 29 of the Court's Interim Rules of Procedure (2010), and the Rules of Procedure of the Commission (2010).[459] These instruments establish the relationship between the African Human Rights Court and the African Commission.[460]

The decision by the OAU to establish the African Human Rights Court was motivated by the "institutional weaknesses [of the African Commission]," which included a "lack of binding effects of decisions and of their implementation by States."[461] In addition, there was significant pressure on the OAU from international human rights NGOs in Africa and outside the continent, including the International Federation for Human Rights, to create a judicial institution dedicated to the interpretation of the Banjul Charter and the adjudication of cases involving the violation of human rights. At the 34th Ordinary Session of the Conference of Heads of State and Government of the OAU at Ouagadougou (Burkina Faso) on June 10, 1998, delegates adopted the African Court Protocol.[462]

Despite the various obstacles that it continues to face, including the decision by some states parties to withdraw their Article 34(6) declarations, the African Human Rights Court has, since it officially started its operations in November 2006 in Addis Ababa, Ethiopia,

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456. *See* Totten, *supra* note 27, at 202.

457. *See id.* at 203 (noting reports of the burning of villages and the killing of non-Arab villagers by the Janjaweed and government of Sudan forces).

458. *See* CTR. FOR HUM. RTS. AT THE UNIV. OF PRETORIA, *supra* note 35, at 2–3.

459. *See Relationship Between the Court and the Commission*, AFR. COMM'N ON HUM. & PEOPLES' RTS., https://www.achpr.org/achprafchpr (last visited Jan. 6, 2023) [https://perma.cc/TZA4-QZ8C] (archived Jan. 6, 2023).

460. *See id.*

461. INT'L FED'N FOR HUM. RTS., *supra* note 32, at 29.

462. *See generally African Court Protocol*, *supra* note 70.

developed a very progressive human rights jurisprudence, which has put the continent on the right path to the protection of human rights. This Article has examined some of the cases brought before the Court; these cases have not only allowed the Court to interpret the Banjul Charter, the continent's preeminent human rights instrument, but have also provided the Court with the opportunity to issue rulings that have become important precedents for domestic courts, particularly on issues involving the violation of human rights and fundamental freedoms.

Despite its success in developing a significant human rights jurisprudence, the African Human Rights Court continues to face many important threats, including the political pressure imposed on it by member states of the AU, the failure of these states to adhere to and implement the rulings of the Court, and the refusal of many states to provide the Court with the financial resources that it needs to carry out its functions. In addition, "mechanisms established to safeguard human rights across the continent are facing enormous challenges, and at least one is facing an existential threat."[463]

During the last several years, at least four states parties to the African Court Protocol have withdrawn their Article 34(6) declarations, effectively rendering the Court incapable of directly receiving cases from nationals and NGOs within the country in question. AI has stated that "[t]he decision by countries to hit back at the [C]ourt for decisions they disagreed with is extremely worrying" and that "African States must refrain from using political muscle against institutions whose very purpose is to ensure [that] justice is available to everyone, regardless of their government's politics."[464]

The African Human Rights Court is quite concerned about the various Article 34(6) withdrawals, arguing that should they continue, they would threaten the Court's effectiveness by depriving millions of Africans of a fundamental right, which they had acquired through an international treaty.[465] The Court has also stated that it views withdrawals of Article 34(6) declarations as a decline in the efforts that many countries have already made to build and sustain democracies in Africa, defend human rights, and promote the rule of law.[466] In its Activity Report for 2020, the Court also noted that it is the only judicial body of the African Union "to which individuals can directly approach in case of alleged violation of one or more of their human rights."[467] Finally, the Court emphasized that the trend towards Article 34(6)

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463. *Africa marks human rights day*, AFRICANIAN (Oct. 22, 2020), https://africanian.com/livenews/africa-marks-human-rights-day/ [https://perma.cc/XM3L-TN65] (archived Mar. 2, 2023).

464. *Id.*

465. *See* AFR. CT. ON HUM. & PEOPLES' RTS., ACTIVITY REPORT, *supra* note 406, ¶ 39.

466. *See id.* ¶ 40.

467. *Id.*

withdrawals "is contrary to and inconsistent with the commitment made by African leaders"[468] in 2016 to "inculcate a true human rights culture on the continent," as well as to place emphasis on the protection of the rights of women.[469]

In addition to threats arising from the unwillingness of some AU member states to accept the rulings of the African Human Rights Court, the latter also suffers from inadequate and insecure budgetary support. While there has been some progress in the AU's efforts to mobilize necessary resources, external or so-called donor-partners still remain the primary source of funding for the AU's development initiatives. In fact, while contributions from member states of the AU are negligible, those from the continent's external partners, particularly the EU and individual European states, provide as much as 75 percent of the funding for AU projects.[470] In addition to the fact that this dependence threatens the ability of AU leaders to make decisions without interference from the EU leadership or that of individual European countries, it does not augur well for the promotion of initiatives that are important to, and directly benefit, Africans.

The failure of many AU member states to meet their financial obligations to the continental organization negatively impacts the budgets of Africa's human rights institutions, which include the African Commission and the African Human Rights Court. For example, in the AU's assessed budget for 2020, both the African Commission and the African Human Rights Court suffered reductions in their budgetary allocations, despite the fact that the need for their services continues to grow.[471]

The African Human Rights Court, like any judicial body, must be granted enough independence so that it can fully and effectively perform the functions granted it by its constitutive act. In addition to financial independence, the Court must have institutional independence, particularly of the type that minimizes interference from any member state in the general functioning of the Court and in its adjudicatory duties. The Court should also be shielded from retribution by states that do not accept its rulings. By failing to comply with the Court's decisions, African governments are grossly undermining the protection of human rights in the continent.

The African Human Rights Court has already contributed significantly to the development of a progressive human rights jurisprudence on the continent. It has the potential to do more and help build a

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468. *See id.* ¶ 41.

469. *See* AFR. UNION COMM'N, AU ECHO, 2016: AFRICAN YEAR OF HUMAN RIGHTS WITH A FOCUS ON THE RIGHTS OF WOMEN 2 (July 2016), https://au.int/sites/default/files/documents/31343-doc-au_echo_magazine_-_july_2016.pdf (last visited Jan. 6, 2023) [https://perma.cc/JS3Q-W22X] (archived Jan. 6, 2023).

470. *See AU Financial Independence: Still a Long Way to Go*, *supra* note 417.

471. During this budget cycle, the African Commission's budget was reduced by 14 percent and that of the African Human Rights Court was reduced by 5 percent. *See id.*

system for the protection of human rights and fundamental freedoms that is effective and sustainable. However, to do so, it must receive support from not just the AU but also from its member states.

In 2004, the African Court on Human and Peoples' Rights (i.e., the African Human Rights Court) was merged with the Court of Justice of the African Union to create the African Court of Justice and Human Rights.[472] However, that merged court is not yet functional and, as a consequence, the only human rights court that currently operates in the continent is the African Human Rights Court. When it eventually becomes operational, the merged court will have two chambers, one to adjudicate general legal matters (i.e., the Court's general affairs section) and the other one to interpret human rights treaties and adjudicate human rights cases (i.e., the Court's human rights section). It is hoped that the Court's human rights chamber will continue to add to the progressive human rights jurisprudence developed by the African Human Rights Court.[473]

Africa's efforts to promote good governance, democracy, respect for human rights, justice and the rule of law, and inclusive and sustainable development through such initiatives as Agenda 2063 and the African Continental Free Trade Area must be built on a solid foundation, one based on the recognition and protection of human rights.[474] Such an approach to peace and security and sustainable and inclusive human development implicates the need for effective and fully functioning human rights institutions. It is important, then, that the AU and its member states continue to strengthen and nurture the African Human Rights Court (and eventually, the merged Court) and provide it with the wherewithal (financial resources, and personal and institutional independence) to perform its functions. In addition to investing in a trust that will guarantee the Court necessary financial independence, all African countries must not continue, through their behaviors (e.g., unwillingness to accept the rulings of the Court; failure to make

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472. The African Court of Justice and Human Rights was established by the Protocol on the Statute of the African Court of Justice and Human Rights. *See* African Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, art. 2 (July 1, 2008), https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [https://perma.cc/FC4W-4SJQ] (archived Jan. 6, 2023).

473. *See generally id.*

474. Agenda 2063, which is officially known as *Agenda 2063: The Africa We Want*, is a fifty-year economic and social development program initiated and adopted by the AU Assembly of Heads of State and Government in Addis Ababa, Ethiopia in January 2015. *See generally* John Mukum Mbaku, *Constitutionalism and Africa's Agenda 2063: How to Build 'The Africa We Want'*, 45 BROOK. J. INT'L L. 537 (2020) (analyzing the constitutional implications of Agenda 2063). The African Continental Free Trade Area is an initiative of the AU designed to create a single, continent-wide market "for goods and services, business and investment" in Africa. *See The African Continental Free Trade Area*, WORLD BANK (July 27, 2020), https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area [https://perma.cc/RU58-GZHS] (archived Feb. 10, 2023).

Article 34(6) declarations; withdrawals of Article 34(6) withdrawals), to frustrate the ability of the Court to function.